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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 248.

THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

IRWIN W. GATES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED APRIL 6, 1886.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, on an appeal from a judgment of the circuit court for Douglas county, Wisconsin, before you or some of you, being the highest court of law and equity of the said State in which a decision could be had in the said suit between The Northern Pacific Railroad Company and Irwin W. Gates, wherein was drawn in question the validity of a statute of the United States, and the decision was against its validity, a manifest error hath happened, to the great damage of the said Northern Pacific Railroad Company, as by *his* complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under

2 your *under your* seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the records and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 15th day of November, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal U. S. Circuit Court, Western Dist. of Wisconsin.]

F. M. STEWART,
Clerk of the Circuit Court of the United States
for the Western District of Wisconsin.

Allowed by—
ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

3 [Endorsed:] Northern Pacific Railroad Company, pl'ff in error, *vs.* Irwin W. Gates, d'f't in error. Writ of error. Filed Nov. 20, '85. Clarence Kellogg, clerk sup. c't Wis.

4 UNITED STATES OF AMERICA, *ss:*

To Irwin W. Gates, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin,

wherein The Northern Pacific Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Orasmus Cole, chief justice of the supreme court of the State of Wisconsin, this 21st day of November, in the year of our Lord one thousand eight hundred and eighty-five.

ORSAMUS COLE,
Chief Justice of the Supreme Court of Wisconsin.

5 [Endorsed:] Northern Pacific Railroad Company, pl'ff in error, *vs.* Irwin W. Gates, def't in error. Citation. Filed Dec. 10, '85. Clarence Kellogg, clerk sup. c't Wis.

STATE OF WISCONSIN, *Douglas County,* } *ss:*

Martin Pattison, being duly sworn, says that he is the sheriff of Douglas county, Wisconsin; that on the 2nd day of December, A. D. 1885, at Superior, in said county of Douglas, he served the within citation on Irwin W. Gates, the person named therein, personally, by delivering to and leaving with said Gates a true copy thereof; and affiant further says that he knows the said Gates upon whom such service was made to be the same person named in said citation and to whom the same is addressed.

MARTIN PATTISON.

Sworn to and subscribed before me this 8th day of December, A. D. 1885.

[Seal Henry S. Butler, Notary Public, Douglas County, Wis.]

HENRY S. BUTLER,
Notary Public, Douglas County, Wis.

6 Supreme Court of the United States.

IRWIN W. GATES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

Know all men by these presents that we, The Northern Pacific Railroad Company, as principal, and Peter E. Bradshaw and Denis Dean, of Superior, in the county of Douglas and State of Wisconsin, as sureties, are held and firmly bound unto Irwin W. Gates, of said Superior, in the sum of five thousand dollars, to be paid to the said Irwin W. Gates, his executors or administrators; to which payment, well and truly to be made, we hereby bind ourselves and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of November, A. D. 1885.

Whereas the above-named Northern Pacific Railroad Company has prosecuted a writ of error in the Supreme Court of the United

States to reverse the decision of the supreme court of the State of Wisconsin affirming the judgment rendered by the circuit
7 court for Douglas county, Wisconsin, in said action:

Now, therefore, the condition of this obligation is such that if the said Northern Pacific Railroad Company shall prosecute its said writ of error to effect and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

NORTHERN PACIFIC RAILROAD COMPANY,
By T. F. OAKES, *Vice-Pres't.* [SEAL.]
PETER E. BRADSHAW. [SEAL.]
DENIS DEAN. [SEAL.]

Sealed and delivered in presence of—
C. K. CATLIN.
HIRAM HAYES.

UNITED STATES OF AMERICA, }
Western District of Wisconsin, } ss:

Peter E. Bradshaw and Denis Dean, being duly sworn, each for himself on his oath says that he is worth the sum of five thousand dollars over and above all his just debts and liabilities.

PETER E. BRADSHAW.
DENIS DEAN.

Sworn to before me this 16th day of November, A. D. 1885.

HIRAM HAYES,
U. S. Court Commissioner for the Western Dist. of Wisconsin.

The foregoing bond is approved as to form and sureties.

ORSAMUS COLE,
Chief Justice Supreme Court of Wisconsin.

8 Pleas before the supreme court of the State of Wisconsin, at at a term thereof begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, the eleventh day, of August, A. D. 1885.

Present: Orsamus Cole, chief justice; William P. Lyon, David Taylor, Harlow S. Orton, and John B. Cassoday, associate justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the second day of July, in the year of our Lord one thousand eight hundred and eighty-five, came into the office of the clerk of the supreme court of the State of Wisconsin, by its attorney, The Northern Pacific Railroad Company, and filed in said court its certain notice of appeal and undertaking, according to the statute in such case made and provided, and also the return to such appeal of the clerk of the circuit court of Douglas county, in said State, in the words and figures following—that is to say:

9 Circuit Court, Douglas County.

IRWIN W. GATES

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY.

To S. Bacon and White & Bower, attorneys for plaintiff, and Charles Lord, clerk of the aforesaid court:

Please take notice that the defendant, The Northern Pacific Railroad Company, appeals from the judgment rendered by the above-named court herein, entered on the 25th day of March, A. D. 1885, in favor of the plaintiff and against the defendant, and from the whole and every part thereof.

Yours, etc.,

W. A. HAMILTON,
Attorney for Defendant.

(Endorsements:) Due service by copy of the within notice accepted this 9 day of June, 1885. S. Bacon, attorney for plaintiff, per S. F. White, of counsel. Filed June 24th, 1885. Chas. Lord, clerk of cir. c't, by H. E. Laffette, deputy. W. A. Hamilton, att'y for def't. Filed July 2d, 1885. Clarence Kellogg, cl'k of sup. c't.

10 Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff & Respondent,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant & Appellant.

Whereas, on the 25th day of March, A. D. 1885, in the circuit court of and for Douglas county, Wisconsin, Irwin W. Gates, the above-named respondent, recovered a judgment against The Northern Pacific Railroad Company, the above-named appellant, for 1,843.11 dollars damages and 136.75 dollars costs, amounting in the aggregate to 1,979.86 dollars damages and costs; and the above-named appellant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, Neil Smith, of the town of Superior, county of Douglas and State of Wisconsin, and —— ——, of the town of Superior, county of Douglas and State of Wisconsin, do hereby, pursuant to the statute in such case made and provided, undertake that the said appellant will pay all costs and damages which may be awarded against it on said appeal, not exceeding two hundred and fifty dollars; and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed the said appellant will pay the amount directed to be paid by the said judgment, or
11 the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

NEIL SMITH.
WM. B. BANKS.

STATE OF WISCONSIN, } ss:
Douglas County, }

Neil Smith, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of two thousand dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

NEIL SMITH.

Subscribed and sworn to before me this 9th day of June, A. D. 1885.

W. A. HAMILTON,
Notary Public.

STATE OF WISCONSIN, } ss:
Douglas County, }

Wm. B. Banks, being duly sworn, says he is one of the subscribers to the foregoing undertaking; that he is a resident of the State of Wisconsin, and is worth the sum of two thousand dollars over and above all his debts and liabilities in property within the State of Wisconsin not by law exempt from execution.

WM. B. BANKS.

Subscribed and sworn to before me this 9th day of June, A. D. 1885.

W. A. HAMILTON,
Notary Public.

(Endorsements:) Due service of the within bond, by copy, accepted this 9 day of June, 1885. S. Bacon, att'y of pl'ff, per
12 S. F. White, of counsel. Filed June 24th, 1885. Ch's Lord, clerk of cir. c't, by H. E. Laffette, deputy. W. A. Hamilton, att'y for def't. Filed July 2d, 1885. Clarence Kellogg, clerk of sup. c't, Wis.

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The State of Wisconsin to the said defendant and each of them:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure to do so judgment will be rendered against you according to the demand of the complainant, of which a copy is herewith served upon you.

WHITE & BOWER AND STEPHEN BACON,
Plaintiff's Attorneys.

P. O. address: Superior, Douglas Co., Wis.

(Endorsements.)

STATE OF WISCONSIN, } ss:
County of Douglas, }

13 I, Lewis C. Thompson, sheriff of the county of Douglas, do hereby certify that I served the within summons and annexed complaint on the within-named defendant, The Northern Pacific Railroad Company, by delivering to and leaving with their ticket agent, Eugene L. Harrison, personally, true and correct copies thereof, at their depot in Superior, Douglas county, Wisconsin, on this 16th day of February, A. D. 1884.

LEWIS C. THOMPSON,
Sheriff Douglas County, Wisconsin.

Fees:

Service	$1 00
Mileage	20
Copy, fol. 26	1 30
	2 50 Paid.

Filed March 11th, 1884.

CHARLES LORD,
Clerk Cir. C't.

Filed July 2, 1885.

CLARENCE KELLOGG,
Clerk Sup. C't Wis.

STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The complaint of plaintiff shows to the court—

I. That at the time of the commission of the grievances by defendant hereinafter stated plaintiff's assignors, Alphonso A. Maxim, Edward F. Le May, and Eugene B. Crane, were copartners, engaged in business at Superior, Wisconsin, under the firm name of Maxim, Le May & Crane; that their business was the sorting, booming, rafting, towing, and delivering logs run down the Nemadji river, collecting and assorting them at the sorting grounds in the waters near the mouth of said river and taking them therefrom to
14 the various mills around St. Louis Bay, at Duluth and vicinity, where the same are sawed into lumber.

II. That the defendant is a corporation, organized and existing under and by virtue of a law of Congress, authorized to build a railroad, and which has actually built and is operating a railroad, part of which lies in the State of Wisconsin, and by the operating of which the defendant has committed the grievances of which plaintiff complains.

III. That the defendant in constructing its railroad has built and operates a bridge across the Nemadji river, in Douglas county, Wisconsin, which is, at that point and above, a navigable stream and navigable for steam-tugs and other craft and for logs and other floatables; that said bridge has a draw in it so constructed as when open to allow the passage of steam-tugs and other craft of like nature, and it was and is the duty of said defendant in operating and using its said road and bridge to keep said draw open at any and all times when the stream is required for the use of tugs and other craft navigating the same and is not in actual use for the passage of trains, so that said bridge shall not be an unnecessary obstruction to the navigation of said stream.

IV. That the said Nemadji river is used for lumbering purposes; that large quantities of pine saw-logs are cut along and near said stream and its tributaries and run down the same for manufacture into lumber at the mills around St. Louis Bay, at Duluth and
15 vicinity; that the ordinary and necessary method of collecting these logs and delivering them to the various owners is by sorting them out near the mouth of said Nemadji river above said bridge, collecting them into booms or rafts at that point, and towing them thence with tugs to the various mills where they are to be manufactured.

V. That said plaintiff's assignors, Maxim, Le May & Crane, were engaged in said usual manner of sorting, booming, towing, and delivering said logs during the fall of 1882, and were delayed by the neglect and refusal of said defendant to open said draw in said bridge or to allow the same to be opened, although the same was not in use at any of said times for the passage of trains, on the following times and occasions during the month of September, 1882, to wit: On the second of September the tug John Pridgeon, then in the employ of said plaintiff's assignors at the fixed and reasonable price of three dollars per hour, was delayed by such neglect and refusal in passing through said bridge with a tow of logs for the period of four hours, and at the same time four raftsmen and twenty-nine men at the booms, employed by said plaintiff's assignors, were by reason of said detention kept idle and their services rendered useless for ½ day; and again, on the eighth of said month the said tug, then in the service of plaintiff's assignors, was again hindered and delayed in like manner for the period of three hours, and thirty-three men, as before, employed by the plaintiff's assignors were kept idle for ½ day; and again, on the 29th of said month the said tug, in the employ of said plaintiff's assignors, was again in like manner hindered and delayed for twenty-four hours, and ten men
16 employed, as before stated, by plaintiffs assignors were kept idle and their services rendered useless for one day, and at none of said times was said bridge in use for the passage of trains, and the men thus kept idle through such neglect of the defendant were receiving and were reasonably worth three dollars each per day wages, so that the whole damage arising and accruing to said Maxim, Le May & Crane for said month amounted to two hundred and twenty-two dollars.

VI. Again in the spring of 1883, at the opening of navigation, the said Maxim, Le May & Crane were engaged in the same business as the fall before, under a contract with the Nemadji Boom Company, whereby they were to receive the sum of forty-three cents per M feet for sorting, rafting, booming, and delivering said logs, which was and is only a reasonable and fair compensation for said services, taking the whole season together and regard being had to the fact that logs must be so handled during the whole season; that the sorting ground for said logs near the mouth of said Nemadji river is so situated that such sorting, rafted, towing, and delivering can be most cheaply and expeditiously performed during the early spring season when the water in the river is high from the thawing of the winter's snow and the early spring freshets; and the whole of said logs ran down said stream in the spring of 1883 in time for such early sorting and delivery, and which amounted to fifteen million feet in said spring, could, if said work had not been obstructed and prevented by the acts of said defendant herein complained of,
17 have been done and performed at a cost and expense of twenty cents per M feet, leaving to said Maxim, Le May and Crane a net profit of twenty-three cents per M feet on the logs so sorted and delivered by them, while if the same were delayed till later in the season there would be no profit in the same at forty-three cents per M feet, and the cost and expense of such sorting, rafting, towing, and delivery at the later date at which the same was compelled to be made on account of the delay caused by the acts of defendant herein complained of was nearly or quite the sum of forty-three cents per thousand feet instead of twenty cents per M feet, that it would have cost for said fifteen million feet if made upon the high water of the early spring, as it would and might have been but for the negligent acts of said defendant hereby complained of and which prevented such work being done; that said plaintiff's assignors, Maxim, Le May & Crane, reasonably expected that said obstructions to the navigation of said streams would not be maintained during the year 1883, but that defendant would make provision for opening said draw whenever the stream should be needed for the navigation of tugs and logs, and at great cost and expense procured chains and other implements and machinery for sorting, rafting, towing, and delivering said logs, and hired tugs to tow said rafts and logs, and on the 24th of April, 1883, commenced their said work; that said plaintiff's assignors, on that day, came with the tug Nellie Cotton, hired by them at the agreed and reasonable price of five dollars per hour, to said bridge with two scow-loads of rigging for use at the booms and were delayed, by the neglect and refusal of said defendant to open said bridge, though
18 no trains were at the time passing over the same, for the period of six hours, at a loss and expense of thirty dollars paid to the said tug and three dollars paid to two men at work on said scows while so delayed. At this time plaintiff's assignors notified defendant, through their agent at Superior, of the necessity of said bridge being kept open, of the damage that would result to their business if it was not kept open, and that they should look to the

defendant company to make good all damage to them caused by such obstruction; that the defendant did not keep said bridge open, though it was seldom used for the passage of trains, but constantly neglected and refused to keep the same open, except occasionally for a short time, and hindered and obstructed the navigation of said stream, so that plaintiff's assignors were compelled to cease their said work until the 24th of May, 1883, when they were first able to go on with their said work, at which time the water had so lowered in the said stream that there was no profit in said contract, and that said work of sorting, rafting, towing, and delivering said logs, which might have been done if done at the time of high water, when it might have been done but for the acts of defendant complained of at an expense of twenty cents per M feet, could not be done at an expense of less than forty-three cents per M feet, and actually cost said sum of forty-three cents per M feet; and plaintiff's assignors thereby, through said acts of defendant, lost the said difference of twenty-three cents per M feet in the sorting, rafting, towing, and delivering of said fifteen million feet of saw-logs which they
19 were delayed and hindered in so handling.

That in making various attempts during said time to carry on their said business said Maxim, Le May and Crane were put to the following expenditures in addition to those hereinbefore mentioned: On the 30th of April the tug Nellie Cotton, employed by said Maxim, Le May & Crane at the stipulated and reasonable price of five dollars per hour in this said business, was hindered and delayed at said bridge by the closing of said draw and lost two hours time thereby. On the second of May the same tug so employed had passed through the bridge on her way up the river after some rafts of logs and on her return found the said draw in said bridge needlessly closed, and was delayed by the neglect and refusal of said defendant to open said draw for fourteen and one-half hours at a cost of $5.00 per hour, paid for the use of said tug, which was a reasonable price therefor, and at a further cost and damage to the chains and for the use of the chains and the loss of time of the men employed upon the rafts of seventy-five dollars. On the 4th of May the tug John Martin, employed by plaintiff's assignors at the reasonable price of four dollars per hour, was detained by the closing of said bridge, without cause or occasion therefor, two and one-half hours. On the fifth day of May the tug Minnie Lemont, on her way up the stream, was detained at the bridged 2½ hours by the same being closed without need therefor, and upon her return with a tow of logs the defendant's agents in charge of said bridge closed the same without any necessity therefor on account of the passage of trains when the tug and its tow of logs was within three hundred
20 or four hundred feet of said bridge and when it was impossible for the tug to return and tow them back, and it was compelled to run into the bank, and the logs broke out of the rafts and broke up the chains by which they were rafted together and caused the plaintiff's said assignors a cost of seventy-five dollars to pay for the time lost by the said tug which was then in their said

employ to repair said chains and again to pick up said logs and get them into shape to tow them.

VII. That on the ninth day of February, 1884, said Max im, Le May & Crane, for a valuable consideration to them duly paid, sold, assigned, and transferred their right of action hereinbefore set forth against said defendant to plaintiff, who is now the owner and holder of the same. Wherefore the plaintiff demands judgment against the defendant for the amount of the damages so as aforesaid sustained by his assignors and by them assigned to plaintiff, amounting, as above set for- in detail, to three thousand nine hundred and forty-seven & $\frac{50}{100}$ dollars, with interest thereon at seven per cent. from the first of June, 1883, and for his costs and disbursements of this action.

WHITE & BOWER AND
STEPHEN BACON,
Attorneys of Plaintiff, Superior, Douglas Co., Wis.

21 STATE OF WISCONSIN, } ss:
County of Douglas, }

Alphonso A. Maxim, being duly sworn, deposes and says that he is agent of plaintiff in the foregoing-entitled action; that the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says that the reason why this verification is not made by the plaintiff is that all the material allegations of the complaint are within the personal knowledge of this deponent and are not within the personal knowledge of said plaintiff.

ALPHONSO A. MAXIM.

Subscribed and sworn to before me this 16th day of February, A. D. 1884.

[Seal of Notary.]

STEPHEN BACON,
Notary Public in and for the County of Douglas, State of Wisconsin.

(Endorsements:) Complaint. Original. Filed in circuit court March 11, 1884. Charles Lord, cl'k. Filed in supreme court July 2, 1885. Clarence Kellogg, cl'k. White and Bower & Stephen Bacon, att'ys for pl'ff, Superior, Wis.

22 STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In this cause plaintiff, by leave of court, on the trial, amends his complaint as follows:

1. By inserting in the first paragraph of his complaint, in folio

one, after the word "Crane" and before the words "were copartners" the words "so far as the same were committed subsequent to Oct., 1882," and by inserting at the end of said first paragraph the words "that at the time of the commission of the grievances hereinafter mentioned, so far as the same were committed prior to the eighteenth of October, 1882, said Alphonso A. Maxim and Edwin F. Le May and one Alfred Merritt were copartners engaged in the same busines as above described under the firm name of Maxim, Le May & Merritt; that on the 18th day of October, 1882, said Alfred Merritt sold and conveyed all his interest in said firm, both that already accrued and that to accrue, to said Eugene B. Crane, who was accepted by said Maxim and Le May as a partner in the place and stead of said Merritt, whereby the right of action for the grievances hereinafter set forth so far as the same before vested in said Merritt thereafter vested in said Crane, and said right of action became part of the assets of the said firm of Maxim, Le May and Crane."

23 2. Amends the fifth paragraph by using in the first and second lines thereof "Maxim, Le May & Merritt," instead of "Maxim, Le May & Crane."

3. Amends the sixth paragraph, in line 6 thereof, by inserting the word "twenty-five" instead of "forty-three" after "of" and before "cents" and by inserting the words "as far as the mouth of the Nemadji river" after "logs" and befor- "which," in line 8 of said paragraph, both these amendments being in folio eight of the complaint; by striking out the word "twenty," in line 26 of said paragraph, and inserting in place thereof the word "eight," and by striking out the word "twenty-three," in lines 27 & 28 of said paragraph, & inserting in place thereof "seventeen," both these amend--ents being in folio 10 of the complaint, and thereafter in said paragraph inserting the word "twenty-five" in place of the word "forty-three," the word "eight" in place of the word "twenty," and the word "seventeen" in place of the word "twenty-three" wherever said words occur.

4. Amends the demand for judgment by striking out the words "nine hundred" between the words "thousand" and "and" in folio 23 of the complaint.

S. BACON AND
WHITE & BROWN,
Attorneys of Plaintiff.

(Endorsements:) Amendments to complaint allowed on trial. Filed in circuit court Feb. 4, 1885. Charles Lord, clerk. Filed in supreme court July 2, 1885. Clarence Kellogg, clerk. S. Bacon & White and Bower, att'ys for pl'ff.

24 *Demurrer.*

STATE OF WISCONSIN, *Douglas County:*

Circuit Court, Douglas County.

IRWIN W. GATES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

And now comes the defendant and demurs to the complaint of the plaintiff on the ground that the same fails to state any cause of action against this defendant.

W. A. HAMILTON,
Defendant's Attorney.

STATE OF WISCONSIN, } ss:
Douglas County, }

W. A. Hamilton, being first duly sworn, deposes and says that he served the within demurrer on Irwin W. Gates March 6, 1884, by leaving a copy with him personally.

W. A. HAMILTON.

Subscribed and sworn to before me this 7th day of March, A. D. 1884.

CHARLES LORD,
Clerk of the Circuit Court.

(Endorsements:) Demurrer. Filed March 7th, 1884. Charles Lord, clerk of cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk of sup. c't Wis. W. A. Hamilton, def't's att'y.

25 Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

This cause coming on to be heard on the issue of law arising on the defendant's demurrer to the complaint herein, after hearing Mr. White for the plaintiff and Mr. Clough for the defendant, on motion of White & Bower and Stephen Bacon, attorneys for the plaintiff, it is ordered that the said demurrer be, and the same is, overruled, with leave to the defendant to serve an answer herein within 20 days after the service on *him* of a copy of this order.

Dated Nov. 7, 1884.

S. H. CLOUGH,
Circuit Judge.

26 STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

The defendant, answering the complaint of the plaintiff, admits itself to be a corporation, as in the complaint alleged; that in construciing and operating its railroad it has built and operated a bridge across the Nemadji river, in this county; that at and above the point where the said bridge is located the said river is a stream navigable by steam-tugs and by logs; that said bridge is provided with a draw adapted to be opened for the passage of steam-tugs and other craft; that the said river is used for lumbering purposes; that considerable quantities of pine saw-logs are cut along said stream and its tributaries and are floated down the same to be manufactured into lumber by the mills located upon and about St. Louis Bay; that the ordinary and usual method of collecting and delivering such logs is by uniting the same into rafts near the mouth of said river, and that when so united it is customary to deliver the same at the several mills aforesaid by towing the same thither with steam-tugs.

Further answering, the defendant says as to whether the said Alphonso A. Maxim, Edward F. Le May, and Eugene B. Crane were ever copartners, as alleged in the complaint, and as to
27 whether they, as such copartners, ever made the assignment and transfer alleged in the 6th paragraph of the complaint, the defendant has no knowledge or information sufficient to form a belief.

Further answering, the defendant denies each and every allegation of the complaint not hereinbefore specifically admitted or denied, and denies that by reason of any of the matters in the complaint referred to the plaintiff has suffered any damage whatsoever.

Wherefore the defendant prays to be hence dismissed with its costs and disbursements in this action.

W. A. HAMILTON,
Attorney for Defendant.

(Endorsement.)

Due service of the within complaint received and accepted by copy this 26th day of Nov., 1884.

STEPHEN BACON,
Att'y for Pl'ft.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

W. P. Clough came before me personally, and, being duly sworn, doth say that he is an officer, to wit, the counsel, of The Northern Pacific Railroad Company, the defendant in the above-entitled action; that the foregoing answer is true of his own knowledge, except as to those matters therein stated on his information and belief, and as to those matters that he believes it to be true.

W. P. CLOUGH.

Subscribed and sworn to before me on this 25th day of November, A. D. 1884.

[SEAL.] E. T. STEVENSON,
Notary Public, Ramsey Co., Minn.

28 (Endorsements:) State of Wisconsin. Douglas county circuit court. Irwin W. Gates, plaintiff, *vs.* The Northern Pacific R'y Co., defendant. Answer. Filed this 26th day of November, 1884. Charles Lord, clerk cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis. W. A. Hamilton, def't's att'y, Superior, Wis.

Notice of Trial.

STATE OF WISCONSIN, *County of Douglas:*

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

SIR: You will please take notice that the issue of fact joined in the above-entitled action will be brought on for trial at the next regular term of the circuit court aforesaid appointed to be held in and for the county of Douglas, at the court-house, in the town of Superior, in said county, on the fifteenth of December, 1884, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Yours respectfully, STEPHEN BACON &
WHITE & BOWER,
Attorneys for Plaintiff.

Dated November 29, A. D. 1884.
To W. A. Hamilton, attorney for defendant.

29 (Endorsements:) Notice of trial. Due service of the within notice is hereby admitted this first day of December, A. D. 1884. W. A. Hamilton, att'y for def't. Filed December 3rd, 1884. Charles Lord, clerk cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis. White & Bower & S. Bacon, att'ys for pl'ff.

STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

In this cause plaintiff asks the court to charge as follows:

I. The only right which the defendant has to maintain the bridge over the Nemadji, on account of which complaint is made, is conditional that a draw be constructed in the bridge and opened when the river at this point is required for the navigation of boats and tugs, and when this duty was neglected the bridge became and was a complete obstruction to the navigation of the river, and the defendant was responsible therefor and for all special damage occasioned thereby.

[On margin in lead pencil:] Waived by pl'ff.

1. The jury are instructed that if they shall find from the evidence that tugs in the employ of Maxim, Le May and Crane were detained at the defendant's bridge over the Nemadji river by reason of the negligent failure of the defendant to open the draw of said bridge upon the demand of said Maxim, Le May and Crane or their servants, then the plaintiff is entitled to recover from the defendant in this action the actual cost to Maxim, Le May & Crane of the tugs and men so detained during such detention.

Refused.

Defendant excepts.

W. A. HAMILTON,
Def't's Att'y.

2. The jury are instructed that the plaintiff is not entitled to recover in this action any damage sustained by Maxim, Le May & Crane by reason of their inability to procure tugs capable of navigating the Nemadji river above the defendant's bridge.

Refused.

Defendant excepts.

W. A. HAMILTON,
Def't's Att'y.

3. The jury are instructed that the plaintiff is not entitled to recover in this action for any damage sustained by Maxim, Le May & Crane by reason of the subsidence of the water in the Nemadji river.

Refused.

Def't excepts.

W. A. HAMILTON,
Def't's Att'y.

4. The jury are instructed that the plaintiff is not entitled to recover in this action for any damage sustained by Maxim, Le May & Crane by reason of their detention at the defendant's bridge over the Nemadji river, together with either the low stage of the water in said river or the inability of said Maxim, Le May & Crane to hire tugs capable of navigating said river above defendant's bridge.

5. The court instructs the jury that if they shall find from the evidence that there were two or more causes concurring to
31 prevent Maxim, Le May & Crane from realizing profits on their contract to bring down the logs as mentioned in the complaint, and that one of those causes was the detention of their tugs at the defendant's bridge, and another was the inability of said Maxim, Le May & Crane to procure tugs capable of navigating the water of the Nemadji river above said bridge, and another was the low stage of the water in said river, and that without the concurrence of all of said causes or of two of them the said Maxim, Le May, or Crane would have realized such profits, then the plaintiff cannot recover in this action any profits the said Maxim, Le May & Crane were so prevented from realizing.

Refused.

Defendant excepts.

W. A. HAMILTON,
Def't's Att'y.

6. The jury are instructed that the plaintiff is not entitled to recover in this action for damages occasioned to Maxim, Le May & Crane by reason of the failure to open defendant's bridge, unless upon the occasion of such failure to open said bridge said Maxim, Le May & Crane demanded the opening of the bridge by the defendants to allow the passage of their tugs.

Not charged literally because it was charged in substance.

Defendant excepts.

W. A. HAMILTON,
Def't- Att'y.

7. The court instructs the jury that it was the privilege of the defendant to keep its bridge over the Nemadji river closed at all times, except when a tug or vessel desiring to pass through demanded that it should be opened.

Charged in substance.

8. The court instructs the jury that it was the duty of Maxim, Le May and Crane to have avoided damages by delay at defendant's bridge over the Nemadji river if they could have done so,
32 and if the damages claimed in the complaint could have been avoided at the expenses of putting a joint in the smoke-stack of any tug in their employ it was their duty to have done so, and in that case the plaintiff would be entitled to recover in this action only for the expenditure that would have been necessary to put such

joints in such smoke-stacks and such actual damages as they would have suffered by reason of the delay in putting in such joints.

Refused.

Defendant excepts.

W. A. HAMILTON,
Def't's Att'y.

The court instructs the jury that the plaintiff cannot recover any of the damages claimed in this action on account of profits on the contract in the complaint set forth, because they are too remote and not the proximate result of defendant's acts.

Refused.

Def't excepts.

W. A. HAMILTON,
Def't's Att'y.

If the jury shall find from the evidence that the profits claimed in the complaint were contingent or depending upon facts and circumstances beyond plaintiff's control, then such profits cannot be recovered as damages in this action.

Refused.

Def't excepts.

W. A. HAMILTON,
Def't's Att'y.

The court instructs the jury that if there were tugs capable of navigating the Nemadji river above defendant's bridge and Maxim, Le May & Crane failed or neglected to hire such tugs, the plaintiff cannot recover damages in this action for any delay occasioned by such neglect or refusal.

Refused.

Def't excepts.

W. A. HAMILTON,
Def't's Att'y.

It being shown by the evidence that the plaintiff, Irwin W.
33 Gates, is not the owner and holder of the claim sued upon and has no interest in the same, but that said claim was assigned to said plaintiff for the purpose merely of bringing this action, he agreeing to apply the proceeds thereof in payment of certain debts of Crane & Maxim, two of said assignors, in his hands, and pay the surplus to said Maxim, Le May & Crane, who are the real parties in interest in this action, the plaintiff cannot recover and the defendant is entitled to a verdict under the direction of the court.

Refused.

Defendant excepts.

W. A. HAMILTON,
Def't's Att'y.

(Endorsements:) Instructions. Filed June 26th, 1885. Charles Lord, clerk cir. c't. Filed July 2, 1885 Clarence Kellogg, clerk sup. c't Wis.

Plaintiff's Bill of Costs for Taxation.

STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Costs by statute under section 2921 Rev. St.:

Retaining fee	$3 00	
Term fee (2 terms) @ $2.00	4 00	
Drawing complaint, 24 folios	6 00	
Copying complaint	2 88	
Drawing summons & copy thereof	37	
34 Argument of demurrer	3 00	
Brief & copies on demurrer	3 00	
Examination of witness books	50	
Trial of cause, 4 days	12 00	
Drawing judgment	75	
Total of costs under statute		$35 50

Disbursements.

State tax	1 00
Clerk's fees	10 90
Sheriff's fees—service of summons & complaint & subpœnas	4 95

Witnesses' fees:

George L. Brooks,	1	day's attendance &	2	miles' travel		1 56
A. A. Maxim,	4	" "	4	" "		6 12
Eli Jacques,	4	" "	20	" "		6 60
H. W. Pearson,	1	" "	10	" "		1 80
Stephen Jeffrey,	4	" "	20	" "		6 60
Randall McDonald,	4	" "	20	" "		6 60
Walter Burns,	3	" "	10	" "		4 80
Ed. B. Pinkham,	4	" "	20	" "		6 60
William Jeffrey,	4	" "	20	" "		6 60
John Wheeler,	3	" "	2	" "		4 56
Duncan Clow,	4	" "	20	" "		6 60
John Jeffrey,	1	" "	10	" "		1 80
Fred. Green,	4	" "	20	" "		6 60
Total amount of witness fees						66 84
Total costs and disbursements for taxation						$119 19

STATE OF MINNESOTA, } ss:
County of St. Louis, }

Shubael F. White, being duly sworn, deposes and says that
35 he is one of the attorneys of plaintiff in the above-entitled cause, and that the witnesses above named, respectively, traveled the distance and actually attended as witnesses in the said cause the number of days set opposite their respective names, and that all the items of said costs and disbursements are according to law and are necessary and reasonable in amount.

SHUBAEL F. WHITE.

Subscribed and sworn to before me this 20th day of March, 1885.
[SEAL.] RICHMOND DE MALLET,
Notary Public, St. Louis Co., Minn.

SIR: You will please take notice that the foregoing is a bill of plaintiff's costs in the above-entitled action and copy of the affidavit of disbursements in support thereof, and that said bill will be presented to the clerk of said court, at his office, in Superior, Wisconsin, on Wednesday, the 25th of March, 1885, at ten o'clock in the forenoon, at which time the plaintiff will move for judgment in said cause and have his costs as taxed included in said judgment.

Truly yours, &c., STEPHEN BACON &
WHITE & BOWER,
Attorneys of Plaintiff.

Dated at Superior, Wisconsin, this 21st day of March, A. D. 1885.
To W. A. Hamilton, Esq., attorney of defendant.

I do hereby tax the costs of plaintiff in the above-entitled cause at the sum of one hundred and nineteen dollars and nineteen cents.
Dated at Superior, this 25 day of March, 1885.

CHARLES LORD,
Clerk of Circuit Court.

36 (Endorsements:) Bill of costs for taxation and notice of taxation. Service of the within bill of costs and affivavit of disbursements and notice relating thereto by delivery to me of copy thereof is hereby admitted this 21st day of March, 1885. W. A. Hamilton, att'y of defendant. Filed March 25th, 1885. Charles Lord, clerk of cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk of supreme c't Wis. Steven Bacon and White & Bower, att'y- of pl'ff.

STATE OF WISCONSIN:

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,
vs.
THE NORTHER- PACIFIC RAILROAD COMPANY, Defendant.

This cause came on to be tried by a jury, who rendered a verdict,

on the sixth day of February, 1885, in favor of the plaintiff and against the defendant, and assessed the damages of the plaintiff at the sum of one thousand eight hundred and forty-three dollars and eleven cents over and above his costs and disbursements, as appears from the record thereof in said cause.

Thereupon the costs of said plaintiff were this day, upon proper notice, duly taxed by the clerk of said court at the sum of one hundred and nineteen dollars and nineteen cents, as appears by the record thereof on file in said cause.

Now, therefore, on motion of said plaintiff, it is ordered and
37 adjudged that said plaintiff do recover from said defendant the said sum of one thousand eight hundred and forty-three dollars and eleven cents so as aforesaid assessed by the jury as damages, seventeen dollars and fifty-six cents interest thereon from said sixth of February to this date, and one hundred and nineteen dollars and nineteen cents taxed as costs, being in all the sum of nineteen hundred seventy-nine dollars ninety-eight cents; and it is ordered that plaintiff have execution thereof against said defendant.

Witness the Hon. Solon H. Clough, judge of said court, at Superior, in said county of Douglas and State of Wisconsin, this 25th day of March, 1885.

CHARLES LORD, *Clerk.*

(Endorsements:) Judgment. Filed March 25, 1885. Charles Lord, clerk cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis. Recorded in Judgment Book, page 548.

Stipulation.

STATE OF WISCONSIN, } ss:
County of Douglas, }

In Circuit Court.

IRWIN W. GATES, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

It is hereby stipulated by and between the parties hereto that all proceedings on the part of the plaintiff are hereby stayed for time sufficient to procure official minutes of the trial of said action made by the reporter of said court and make a motion for new trial therein and make appeal from the decision thereof by the
38 party who shall be defeated in said action, and the defendant herein agrees to use all diligence in procuring such minutes of trial, and also agrees that if it appeals said action that the same shall be heard by the supreme court of said State at its next term.

March 31, '85.

S. BACON,
Attorney for Plaintiff,
Per S. F. WHITE, *Counsel.*
W. A. HAMILTON,
Attorney for Defendant.

(Endorsements:) Stipulation. Filed the 9th day of April, 1885. Charles Lord, clerk cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis.

STATE OF WISCONSIN, } ss:
County of Douglas, }

In Circuit Court.

IRWIN W. GATES, Pl'ff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Def't.

Upon the stipulation of the attorneys for plaintiff and defendant, herewith presented to the court, and upon motion of W. A. Hamilton, attorney for the defendant, no one appearing to oppose, it is ordered that all further proceedings in the above-entitled action on the part of the plaintiff be stayed for sufficient time to procure the official minutes of the trial of said action made by the reporter of said court, according to the terms of said stipulation, or until
39 otherwise ordered by this court.

Dated April 8, 1885.

S. H. CLOUGH,
Circuit Judge.

(Endorsements:) Order. Filed April 9, 1885. Charles Lord, clerk cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis. Recorded in Order Book, page 178. Fee paid, 25c.

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

vs.

NORTHER- PACIFIC RAILROAD COMPANY, Defendant.

To W. A. Hamilton, Esq., attorney for defendant:

Please take notice that the judgment was entered in the above-entitled action in favor of the plaintiff and against the defendant for eighteen hundred and forty-three & $\frac{11}{100}$ dollars and one hundred and thirty-six & $\frac{75}{100}$ dollars costs, in the office of the clerk of the circuit court, county of Douglas, on the 25th day of March, A. D. 1885.

Yours, &c.,

S. BACON,
Att'y for Pl'ff,
Per S. F. WHITE,
Of Counsel.

(Endorsements:) Notice of entry of judgment. Due service of the within notice accepted this 9th day of June, 1885. W. A. Hamilton, att'y for defendant. Filed June 24th, 1885. Ch's Lord, cl'k, by A. E. Loffette, dept. cir. c't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis.

40 *Bill of Exceptions.*

STATE OF WISCONSIN:

Douglas County Circuit Court. December Term, 1884.

IRWIN W. GATES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

This cause came on to be heard before Hon. Solon H. Clough, judge of the 11th judicial district, at a general term of said court, held at the court-house, in Superior, in said county, on third Monday in December, 1884, to wit, on the third day of February, 1885; and thereupon, by agreement between the attorneys for the plaintiff and for the defendant, the defendant's attorneys move to strike out all that portion of the complaint commencing at the 6th paragraph of the 8th folio and including the balance of folio 8 and all of folio 9, 10, 11, 12, 13, 14, 15, 16, and down to the words "in so landing," in the 17th folio; all that part of the complaint which claims damages for profits lost under a contract of Maxim, Le May & Crane with the Nemadji Boom Company. The motion to strike out was made on the ground that all that part of the complaint above specified was immaterial and did not state any cause of action.

Motion overruled by the court; exception duly taken by defendant's attorneys.

Thereupon a jury was called and sworn.

ALFONZO A. MAXIM was then called and sworn as a witness on part of the plaintiff and testified as follows:

41 I reside in Superior, Wisconsin. I was one of the firm of Maxim, Le May & Crane during the year 1883 and a part of 1882. The business of the firm was driving, sorting, and towing logs in the Nemadji river, which empties in Superior Bay. We drive the logs from Copper creek. From Copper creek down to within 3 miles of the booms we cannot drive anything after the running snow-water is gone. The stream is navigable 3 miles above the boom. Our sorting operations were carried on about a mile and a half above the railroad bridge. The river averages about 180 feet wide from its mouth to the boom. The bridge is a half a mile from the mouth of the stream. We assorted the logs in 1882 in 15 pockets, arranged along the side of the race next to the river. When the booms were filled we had small tugs to take the logs through the bridge, where they were made up into the rafts, 6 or 7 booms forming one raft; thence we towed them across to Duluth. In the season of 1883 we boomed the logs on the Muskegon style. The race was in the center of the river; the pockets on either side. We made the logs into rafts 76 feet long, using chains and dogs. The dogs were spikes fastened to the chains, and one was driven into each log. The rafts were let out of the pockets and coupled together further down the river into strings 1,000 feet long. We had a small tug which towed those logs where they were made into rafts, 6 strings

being put into a raft. In September, 1882, the firm was Maxim, Le May and Merrit, Alfred Merrit being the last-named member.

(Assignment from Mr. Merrit to Mr. Crane offered and
42 received in evidence.)

Mr. Le May and myself assented to this change. The Northern Pacific swing-bridge and pier was a half a mile above the mouth of the Nemadji river. On September 2nd, 1882, the tug Pridgeon came from Duluth and up the river, taking assorting booms to the sorting grounds. I was paying him $3.00 per hour. It was delayed there 2 hours at that time on account of the bridge being closed and no one there to open it. I made a minute of it at the time. I took the time from the tugmaster. I was not there when he got to the bridge, but I was before he went away. I asked him how long he was there and he said 2 hours. We had at the booms at that time 29 men and 3 raftsmen, who were delayed 2 hours. We paid one of these men $3.00 per day, one $3.50, and 30 $2.25 and board. Board was worth 75c. a day apiece. 11 hours is a working day. The next occasion of delay was on the 10th of September. The tug John Pridgeon was delayed at that time 4 hours. I was paying it at that time $3.00 an hour. The next occasion was on the 29th of September; the tug was delayed 8 hours. There were no trains running across the bridge on any of these occasions. I did not see any the first time I went up to the construction department. They said they run the bridge at that time. They said they would have it opened, and they did open — for awhile. I went to see about opening it each time myself, except once, when Captain Jacque went. There was nobody at the bridge to open it either of those times. I
43 was at the bridge some of the time on each occasion. I was in the same business in the spring of 1883. I was delayed that spring. I first commenced work so as to want to go through the bridge that spring on the 24th day of April. I went there in the morning with the tug Nellie Cotton and 4 scow-loads of chains & rigging. I had 2 raftsmen beside myself on the 4 scows. He blew the whistle when he first came in the mouth of the river. We went to the bridge, and did not see anybody. The tug hitched to a spile, and I went uptown to the court-house. They referred me to Mr. Taylor. I went and saw Mr. Taylor, and told him the way I was fixed, and asked him if there was no one here to open the bridge. I told him I had 30 men at the boom waiting for the bridge to be opened, while he was charging me with the tug while we had the tug. He said, "Maxim, I feel sorry for you, but I can do nothing for you." I told him I had the bills to pay, and if that bridge could not be open all the time it would ruin me, and I would sue the company for damages. He said, "I don't blame you; they hav-n't used me right about the bridge. It would take a whole crew to open the bridge. They were to send men to fix the bridge, but they had not done it." I went back to the tug and waited about 4 or 5 hours. The tug was delayed in all 6 hours. The owners of the tug then took it away. We were paying the tug $5.00 an hour. I was paying the men on the scow 40 dollars a month and board.

Mr. Taylor was the local agent of the company here. I kept on trying to use the stream. They took the tug Nellie
44 Cotton away from me and I could not get another for 5 or 6 days. The next tug I got was the John Martin. I could not get the Nellie Cotton back not until they had done some work for Peyton. I got the John Martin on the 30th of April. I was stopped at the bridge something like two hours. I took the figures from the captain. I paid him $4.50. The next was on the 2nd of May. I think I was delayed 4 hours at that time at $4.50 an hour. The last time, I think, he was there it was delayed 14 and a half hours. I was with the tugs on both these occasions. We had 2 men on the rafts all the time. On the 5th of May I hired the Minnie La Mont in Duluth; she came over to the bridde. There was no one there in sight. She blowed the whistle; nobody came. I went uptown. I think it was 2 hours before any one came; they came and let us through, and I went up with the tug and got a tow of logs and came down. I was not with the tug when it came down; it was a few minutes after twelve when I got to where the tug was. The nose of the boat was sunk and the logs piled down against it; it cost me a half a day's work for the crew and the tug. I was paying the tug $25.00 a day; that would be $12.50 for the half day. We had 26 men; we paid one of them 65 dollars a month and board; the rest we paid 40 dollars and board; the board was 50 cents a day. I could not hire any tugs after that. Jeffrey, the captain, refused to let me have the tug any more. There was not a tug in the Bay of
45 Superior could go under the bridge without unjointing the pipe, taking the rivets out, and taking it down; they all refused to do that, except the Minnie Lamont done it once or twice. I could not get another tug until I got the tug Hope from Saginaw the 24th of May; it had a stack with joints in it, so as to drop it down. There was no tug in either bay that could do that. I could not have got it here any sooner than the 24th of May.

Question. In the regular method of doing this business when should the work of towing and sorting these logs to the mouth start up and be done, of those logs that came down in the early spring?

Objected to by the defendant's attorneys; objection overruled by the court; to which an exception was duly taken by the defendant.

Answer. This river here, the Nemadji river, as soon as the spring freshet is gone, some days, nearly all day, there will be a current going right up the river; sometimes it will go up one hour and come down the next. In the spring of the year the freshets will last 30 days, and we have a nice current all the time for sorting logs. As soon as the current dies away we cannot sort enough to pay expenses lots of times, nor half.

Question. When should this be done?

Answer. On the spring freshets, when there is a current in the river.

Question. State what the fact was with regard — when that spring freshet closed that spring.

Objected to by defendant's attorney as incompetent; ob-
46 jection overruled by the court; exceptions duly taken by defendant's attorney.

Answer. The latter part of May.

Witness continues: The spring freshet was nearly at its close; when we were able to get to work there was a current all the time from the 24th of April to the 24th of May.

Question. State whether or not, as circumstances were that spring, you could get there to do that work.

Objected to by defendant's attorney; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. We only sorted 4 million in 30 days.

Witness continues: We had a large force of men and kept to work all the time; there were 22 or 24 million feet, according to the scale, that came down the first water that spring.

Question. How many could you have assorted with the force you had if you could have got through the bridge with the tug in the same time and with the same force?

Objected to by defendant's attorney; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. I could have assorted 15 millions more than I did assort.

Question. State whether or not there was any other cause prevented you from doing their work except the bridge being closed so you could not get there.

Objected to by defendant's attorneys; objection overruled; exception by defendant.

47 Answer. I do not know of any after we commenced sorting logs.

Witness was here questioned as to his experience in sorting and delivering logs, and details an experience of several years in the business in various localities.

Question. You may state what the difference in the cost of that work was, doing it during the high water in the spring on the spring freshet, at the time you have just testified, and doing — later in the season when the water had run down.

Objected to by defendant's attorneys; objection overruled; exception by defendant.

Answer. I am certain it would cost four times as much to do it after the current had gone as it would before. We could have done it for 10 cents a thousand with the current.

Plaintiff's counsel offered in evidence the contract between Maxim, Le May and Merritt, made the 29th of July, 1882, for doing this very work, in the words and figures following, to wit:

(Amendment of pleadings, so as to make contract offered correspond to the one pleaded, consented to and made in open court.)

This agreement, made and entered into this twenty-ninth day of July, A. D. 1882, between the firm of Maxim, Le May & Merritt, of Duluth, Minnesota, parties of the first part, and the Nemadji Boom Company, a corporation organized, existing, and doing
48 business under and by virtue of the laws of the State of Wisconsin, party of the second part, witnesseth:

That said first parties, in consideration of the payments to be made and the covenants and agreements to be kept and performed by said second party, as hereinafter set forth, hereby agree as follows:

That they will assort, raft, and hold for delivery all pine logs now in said second party's boom, and also all such logs as may hereafter, during the continuance of this contract, be driven into said boom.

That all such assorting, rafting, and holding logs for delivery shall be done in the Nemadji river and not in the bays.

That they will maintain said boom and have the same at all times in good and substantial condition for the reception and safe storage of all logs that may be driven or come within the limits of said boom.

That they will make and maintain all sorting gaps necessary for the expeditious handling, assorting, and rafting of said logs.

That they will assort said logs as to marks in such manner as said second party may from time to time direct.

That they will be responsible to said second party for any and all damages occasioned by reason of assorting or handling said logs or any portion thereof below the main boom, and that in establishing new works or handling said logs below said main boom nothing shall be done that will in any manner interfere with the free navigation of said river.

49 That for the balance of this season they will clean and drive rear from where the rear end of main jam now is, and after this season and during the continuance of this contract they will clean and drive the rear from the rear end of solid jam up said river as far as the mouth of Copper creek.

That they will boom all flats between said creek and main boom in such a manner as to prevent any logs going out on flats and will hold second party harmless for any expense, claim, or liability for damages on account of any logs going out on said flats.

That they will deliver said logs at said boom to such person or persons and to such person or persons only as said second party may direct, and that in case of any violation of this provision on their part they will pay to said second party on demand the full value of any and all logs delivered contrary to the instructions of said second party.

That they will take receipts for all logs delivered by them to any person or persons at said boom, and will be responsible and liable to said second party for any and all logs delivered by them for which they cannot show receipts.

That they will take care of and properly store in some safe and convenient place all stray or unmarked logs coming into said boom until such time as said second party shall dispose of the same.

That during the balance of this season they will assort and
50 raft said logs the same as now being done, and after this season and during the continuance of this contract will do such rafting with dogs and chains under the system now in use at Muskegon, Michigan.

That they will at their own cost and expense furnish everything requisite and necessary for the faithful performance and completion of said work in manner aforesaid, and will, with a sufficient force of men, tools, and supplies, prosecute and complete the same during each and every year with all due diligence and dispatch, and will perform the same and every part thereof in a good and workmanlike manner and as expeditiously each season as the elements will permit.

That they will perform the work aforesaid at and for the price and consideration of twenty-five cents per thousand feet, board measure, of saw-logs, such consideration to be paid by said second party at the time and in the manner hereinafter specified and set forth.

In consideration of the foregoing agreements to be kept and performed on the part of said first parties, said second party hereby agrees as follows:

That they will and do hereby let to said first parties the job of doing said work in the manner aforesaid, and will pay them therefor the said price of twenty-five cents per thousand feet, board measure, of saw-logs, in manner following—that is to say, seventy-five per cent. of said price on the tenth day of each and every month, for all logs assorted and rafted during the month immediately preceding the date of such payment, and the remaining twenty-five per centum thereof at the close of each season's operations; or, in case said
51 logs shall all be assorted and rafted out as aforesaid prior to the close of any season, then and in that case said balance shall be paid within sixty days from the time when the last saw-logs shall have been rafted out and assorted, as aforesaid, during such season.

It is further mutually understood and agreed by and between the parties hereto as follows:

This contract shall remain in force until the first day of January, 1888: Provided, however, That in case any legislation shall be enacted whereby the existing rights of said Nemadji Boom Company shall be adversely affected or its charter be changed or amended, then and in such case said second party hereby reserves the right to cancel or change this contract.

It is further agreed that all tools, boom-sticks, chains, ropes, cooking and camp fixtures now owned by said second party shall be turned over to said first parties on the signing of this contract at an invoice price to be agreed upon, and that at the expiration of the contract the same or any part thereof shall be taken back by said second party at said invoiced price, provided the same shall be in as good condition as now, and all chains and dogs belonging to first parties at expiration of this contract to be transferred to second party at a reasonable price therefor.

It is further agreed that all logs coming into said boom the title to which shall in any manner be in dispute, and also all logs upon which the booming, assorting, and rafting charges shall not have been paid as required by second party, shall, on notice from said second party, be held by first parties in some safe and con-
52 venient place to be provided by them, subject to the further orders of said second party, and second party shall pay the actual expenses of such extra work.

It is further agreed that all of said logs so to be driven, assorted, and rafted out by said first parties as aforesaid shall be scaled as rafted by some competent person to be agreed upon by the parties hereto, each party to pay one-half of the expense of scaling and first parties to board scaler while scaling, and that such scaling be done according to Scribner's rule.

It is further agreed that for all of said logs so assorted and rafted as aforesaid during the balance of this season said first parties shall be paid the price of thirty cents per M feet instead of twenty-five cents, as heretofore mentioned.

It is further agreed that, in consideration of said first parties making this year a clean drive of the rear above the rear end of where main jam now is and putting in good and substantial booms along the margin of said river, so as to prevent logs going out on flats, said second party will pay them, as soon as all logs are rafted and delivered this season, the sum of $1,250, and as soon as the construction of the booms aforesaid is completed the additional sum of $1,250, but all such booms shall be the property of and belong to said Nemadji Boom Company on the expiration of this contract.

It is further understood and agreed by both of the parties hereto that in case said first parties shall for any cause during the continuance of this contract fail to pay for the labor or material
53 used by them on any portion of the work aforesaid during any preceding month, that said second party may withhold a sufficient portion of the amount due said first party the next succeeding month to cover such claims for labor and material, until satisfied that all such claims as might in any way be or become a charge or lien upon the property of said second party or on logs and timber in their said booms have been fully paid and discharged.

In testimony whereof said first parties have hereunto set their hands and seals, and said second party has caused this contract to be signed by its president and to be attested and its corporate seal affixed by its secretary the day and year first above written.

In duplicate.

MAXIM, LE MAY & MERRITT,
By E. F. LE MAY. [SEAL.]
E. F. LE MAY. [SEAL.]
A. A. MAXIM, JR. [SEAL.]
ALFRED MERRITT. [SEAL.]
WILLIAM KIMBALL, *Pres.*
Attest: EDWARD A. GILBERT, *Sec'y.*

In presence of—
DAN'L E. CASH.
HENRY A. SMITH.

(Endorsements:) Contract. Driving & assorting logs, &c. Nemadji Boom Company with Maxim, Le May & Merritt. Duplicate, July 29th, 1882.

To the admission of which said contract in evidence defendant's attorneys excepted as being incompetent, irrelevant, and im-
54 material, and inadmissible under the pleadings.

Objection overruled by the court.

Exception duly taken by defendant's attorneys.

Contract read in evidence.

Defendant's counsel asked to have an objection entered to all questions as to whether plaintiff hired other tugs.

Witness continues: During the year 1883 the work we were doing was being done under this contract.

Cross-examined:

On the 2nd of September, 1882, at the time of the detention of the tug John Pridgeon, I was there on the bank of the river. The Northern Pacific road was being operated by the construction company. The bridge was there. There were no trains running. The Pridgeon was coming up then. These 29 men were idle, waiting for the booms the tug was bringing up. The Pridgeon got to the bridge in the afternoon. I do not know of my own knowledge how long she was delayed. The men at the boom were delayed the actual time I paid the tug for laying at the bridge. The next delay was on the 10th of September, I think. I was not on the boat. I do not know how long it was delayed, only by the bill he presented me. The next delay was on the 29th of September. I do not know what time the boat got to the bridge nor how long he was delayed. He could not get through the bridge at all, and layed there the balance of the day and all night and went back to Duluth in the fore-
noon and would not come back any more. He left the
55 booms in the river to get them up the best we could. I did not see Mr. Taylor at that time. In the spring of 1883 I was in the same business. I went up the river on the 24th of April with the tug Nellie Cotton. She took out a raft on the 30th day of April. We had taken out no rafts prior to that date. The rafts were numbered. This was raft number 1. I was on the Nellie Cotton when it was delayed 2 hours on the 30th of April. If I ever stated it was the John Martin took that raft out I was mistaken. On the 2d of May the tug Nellie Cotton took out raft number 2. On the 4th of May the tug John Martin was delayed two hours and a half at the bridge. I was mistaken if I swore it was 14 and a half hours then. I have got it down here correct (referring to a book). When she came up she stopped at the bridge two hours and a half, and when she came down with the tow it was after 6 o'clock and she layed above the bridge all that night—twelve hours—making the 14½ hours. That day they kept the bridge open until 6 o'clock. The first appearance of a boat at the bridge that spring, so far as I know, was on the 24th day of April. The Minnie La Mont was a

small tug we kept working in the river all the time. On the 5th of May we had 26 men employed and made 2 trips with the rafts of logs. I was not with the Minnie La Mont that time and do not know how long she was delayed. We had trouble about getting tugs and I hired the tug Hope. She came here on the 24th of May and worked in the river all the time.

56 (Witness refers to receipts for delivery of logs, and testifies to the date of taking out rafts, the number of the rafts, and the number of logs and feet they contain, as follows:)

Date.	No. of raft.	No. of logs in each raft.	No. of feet in each raft.
1883.			
April 30	No. 1	1,373	238.564
May 1	" 2	2,684	428,050
" 5	" 3	3,142	403,056
" 8	" 4	2,909	457,697
" 12	" 5	2,407	362,215
" 15	" 6	2,264	331,201
" 21	" 7	1,827	265,812
" 21	" 8	1,828	228,487
" 22	" 9	2,041	317,182
" 22	" 10	2,439	406,022
" 23	" 11	2,157	429,814
" 24	" 12	2,560	388,019
" 26	" 13	2,509	554,859
" 28	" 14	2,725	542,997
" 29	" 15	2,820	459,420
" 30	" 16	3,122	637,728
" 31	" 17	1,773	290,560
June 9	" 18	2,192	378,978
" 11	" 19	1,913	314,173
" 11	" 20	1,900	286,122
" 12	" 21	2,514	390,784
" 14	" 22	320	48,912
" 15	" 23	1,394	215,139
" 16	" 24	2,899	478,377
" 19	" 25	3,290	468,479
57			
" 21	" 26	3,079	402,583
" 22	" 27	2,994	430,615
" 22	" 28	2,206	312,994
" 23	" 29	2,249	359,983
" 23	" 30	2,164	353,816

Date.	No. of raft.	No. of logs in each raft.	No. of feet in each raft.
1883.			
June 25	No. 31	2,689	447,362
" 26	" 32	2,225	338,856
" 26	" 33	2,119	368,041
" 27	" 34	3,213	566,593
" 28	" 35	2,108	383,219
" 29	" 36	2,662	491,524
" 30	" 37	2,832	490,962

Witness continues: In the spring of 1883 the freshet began on the 17th of April. The water does not rise or fall a great deal unless when there is a large freshet; then it rises fast and goes down quick. There is a gradual current as long as the snow-water lasts. The good water for sorting lasted in the spring of 1883 till about the first of June. In the spring of 1883 we had 23 men up to about the 15th of May, and after that we had 31. We had 24 men in April. We could have sorted on the high water in May for ten cents a thousand. When we did do the sorting it cost us 25 cents per thousand. On the 8th of September, 1882, the tug was detained four hours, and because of it the men were detained at the boom four hours.

Witness on cross-examination testified at length as to the detention of Sept. 29, 1882, and the number of men employed.

58 Plaintiff's counsel offered in evidence the assignment from Maxim, Le May & Crane to I. W. Gates, the plaintiff, in words and figures as follows, to wit:

This agreement, made this ninth day of February, A. D. 1884, by and between Maxim, Le May and Crane and Irwin W. Gates, both of Superior, Wisconsin, witnesseth:

That the said Maxim, Le May & Crane have a cause of action against the N. P. R. R. Co. for obstructing the navigation of the Nemadji river and preventing the performance of work and labor by the said Maxim, Le May & Crane in sorting, towing, and delivering logs in said Nemadji river and Superior and St. Louis Bays, and they hereby assign the said claim to said Irwin W. Gates. In consideration of such assignment said Gates, who holds in his hands a large number of claims and accounts against said Crane & Maxim, agrees to prosecute said claim to final judgment and apply the net proceeds arising from the same, after judgment of costs, expenses, and trouble, to the payment of said claims, and in case he shall re-

ceive more than enough from this claim and other sources to pay said claims in full, then to pay the surplus to said Maxim, Le May & Crane.

It is mutually understood that this assignment is not by way of security merely, but is absolute and unconditional, and the only liability on the part of said Gates to said Maxim, Le May & Crane is to pay over the amount, if any, finally due to them on final settlement, after paying said claims in full.

Witness the signatures of the parties the day and year first above written.

MAXIM, LE MAY & CRANE.
IRWIN W. GATES.

59 To the admission of which said assignment defendant's attorneys objected, on the ground that it did not show upon its face an assignment of this claim to the plaintiff; that it virtually makes the plaintiff an agent of Maxim, Le May and Crane to enforce this claim; that it shows that this suit is not brought in the name of the real party in interest, but that the real party and the beneficiary in this suit is Maxim, Le May and Crane.

Objection overruled by the court.

Exception duly taken by the defendant's attorneys.

Assignment read in evidence.

ALFONZO A. MAXIM recalled, and on redirect examination testified as follows:

These strings were made up at a point just below the boom where the tug came to take them; not any of the large tugs could go up there; nothing could go up there that drawed over five feet and a half. The Minnie La Mont and the Pridgeon were the only ones that could go up there until the Hope came. There was smaller tugs here, but they could not go up, because the water was too low at any time; the large tugs could never go clear up. When the current is gone in the river there is a tide coming in and out of the bay here. During the time when we could not hire tugs we worked the strings down by hand as well as we could. We used to have the large tugs go through the bridge as far as they could. The Martin could not go up further than 1,000 feet above the bridge and the Nellie Cotton could go up three times that far, to the next bend; about half way to the boom. We poled the rafts down by hand to where they were taken by the tugs. We kept to work all the time. The process was very slow.

60 Recross-examination:

We brought these strings down by hand after the Minnie La Mont went away; that was May 7th. There was not water enough for the Nellie Cotton and John Martin and tugs of that size. This work continued from the 7th to the 24th of May. This tide was variable. It would change sometimes five times a day.

H. W. PEARSON, sworn as a witness on the part of the plaintiff, testified as follows:

I was a director of the Nemadji Boom Company for the last 4 years and boom-master for two years in that time. I am acquainted with the Nemadji river as regards the manner of booming, rafting, towing, and sorting logs.

Witness describes the Nemadji river booming grounds.

Question. Is there any difference with regard to the expedition and cheapness of assorting these logs as to the time of the year, the stage of the water it is done in?

Objected to by defendant's attorneys; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. The logs can be handled cheaper when the current is running down the river than they can when the current is running up the stream, for the reason with a good current in the river the logs come down; they would come down without any manual labor whatever, virtually. When the current is running up the stream they have got to be hauled with main force. On the spring
61 freshet from the melting snows in winter they usually have high water in that stream.

Question. How long does that continue so as to be good sorting?

ENSIGN, counsel for defendant: I do not desire to interpose a separate objection to each question.

The COURT: Well, it is understood that all this evidence which has reference to how this work at the booms was effected by the stages of water or the season of the year is under objection.

Exception duly taken by defendant's attorneys to the admission of all such evidence.

Answer. Well, I could not say with certainty; I can only give my opinion; I should say about 30 days. I have been on that river every spring for five years. I based my opinion on that experience.

ENSIGN, defendant's counsel: We move that the opinion taken may be stricken out.

Motion overruled by the court; exception duly taken by defendant's attorneys.

Witness continues: I estimate not less than 15, but I think 20, million logs came down on the first water in the spring of 1883.

Cross-examination:

I do not know who was boom-master in the spring of 1883. Our drive is in the Balsam, above the boom; not in the boom limits. The rise and fall of water and high and low water was extremely variable. I never counted the logs; I make merely an estimate. I have known of rains helping out the high water in the spring.

62 ELI JACQUES, sworn as a witness on the part of the plaintiff, testifies as follows:

I am and have been for the last three years master of the tug John Martin. I remember going to the Nemadji for logs for Maxim, Le May and Crane.

Question. How did you find that bridge when you came to it, with regard to a watchman being there to open it?

ENSIGN, counsel for defendant: In the complaint there is only one instance of the tug John Martin averred, and we submit that the testimony shall be confined to that instance. I object to the question.

Objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. Well, sometimes we found a watchman there and other times there was nobody there. There was about three times that I wanted to go through the bridge, on the 1st or 2nd and, I think, on the 4th and on the 16th of May, that I did not find anybody there. (Witness continues:) About the 4th or 5th of May—it was quite awhile ago and pretty hard to recollect exactly—I was delayed some two hours and a half. I cannot say exactly to half an hour. I was receiving 4 dollars and a half an hour. I went there with the tug.

Cross-examination:

There were only three times while I was in the employ of Maxim, Le May & Crane when I passed there when there was no
63 watchman. The first was in the forenoon of the 1st or 2nd of May; the 2d was about 3 o'clock on the 4th or 5th of May; the 3rd was in the morning of the 16th. I passed there about a half a dozen times or so from the 1st until the 22d of May—that is, until this little tug came, the Hope. I towed there all the logs that was taken.

EDWARD PINKUM, sworn as a witness on behalf of the plaintiff, *and* testified as follows:

I was foreman on the Nemadji boom in the fall of 1882 for Maxim, Le May and Crane. I have had 18 years' experience on the St. Louis, Nemadji, and other rivers.

Question. How is the Nemadji river with regard to sorting logs on the high or low water?

Objected to by defendant's attorneys; objection overruled by the court; exception duly taken by defendant's attorneys.

—. There was a big difference in the stage of water in regard to rafting logs, especially on that stream, more than any other I ever saw. I was there enough to notice the difference. When we got a little rain storm it would make a difference in the head we had; of course, in the spring of the year it would make a difference longer, but that was sufficient to show what the stream was. We had some wet

weather when I was there, enough to show the difference. I was there on the 2nd and 10th of September.

Witness continues: Maxim or that firm had 33 men at work at that time. The men got two twenty-five and I five dollars a day every day, whether we worked or not, and board.

64 Cross-examination:

(Witness refers to a book.) This is a time book that I kept myself. On the 10th of September we had 13 men. About the 2d of September there was 32. At the time I speak of that a little rain we had did us good was in the dry part of the season, July or August, when there was a great scarcity of water all over the country.

Redirect examination:

It was a want of current, not of water, that I speak of. On the 8th of September we had 24 men. They received the same wages I testified to on the 2nd.

Amendment permitted in court of 10 of September to 8 of September in complaint.

DUNCAN CLOW, sworn as a witness on behalf of plaintiff, *and* testified as follows:

I am master of the tug John Pridgeon. In the year 1882 I was at work on the Nemadji river towing booms up to the sorting gap and bringing rafts down with them for Maxim, Le May and Merritt. I had one of these light-draft tug-. I had difficulty passing through the bridge on the Nemadji. On the 2nd of September I was delayed 4 hours. I was going up with boom sticks. On the 8th of September I was delayed about 3 hours. On the 29th we got there in the evening about 6 o'clock and stayed until 7 the next morning, when I started for Duluth. I whistled several times, both at night and in the morning; did not go through the bridge at all. This delay was below the bridge. It was some 13 hours. I was getting
65 3 dollars an hour. I was not there in the spring of 1883.

FREDERICK GREEN, sworn as a witness on behalf of the plaintiff, testified as follows:

I reside in Duluth. I was master of the Minnie La Mont in 1883; on the 5th day of May, 1883, in the employ of Maxim, Le May and Crane on the Nemadji river. We came over from Duluth and went up to the bridge and could not get through. We lay at the bridge some 2 hours or two and a half. Finally we got through and went up and got a raft, or a string, rather, and we come around the bend below where the ferry crosses and I whistled for the bridge and the bridge was open, and when I got within a 100 feet of the bridge the bridge closed. They shut the bridge on me and I could not get through. There was a train passing shortly after they closed the bridge. The consequence was that I got up on the abutment that the bridge was built up upon and the logs crowded me on the pier

of the bridge. Our exhaust pipe broke, and then we could not do anything if the bridge had been opened until we got the pipe fixed. After dinner they went on and fixed up the logs and pieces of the string and shoved them through with poles. It was about 4 o'clock when we got straightened up so as to go on. We got down to the bridge about noon. I could not turn around, because I was on top of the abutment then. I stayed there two or three days longer in their employ, when the owner told me to pull off. I was not there any more during the season. I was only on the boat three weeks after that.

66 Cross-examination:

I came up on the morning of the 5th. Mr. Maxim went off to find the bridge tender. I blowed the whistle. I could not see if there was any bridge tender on the bridge. I could not say whether the train of which I spoke was in sight when I came in sight of the bridge. The train passed almost immediately after the bridge closed. They let me go through as soon as I wanted to go through, in the afternoon, about 4 o'clock.

WILLIAM JEFFREY, sworn as a witness in behalf of the plaintiff, testified as follows:

In the year 1883 I was the control-ing owner and part of the time master of the tug Minnie La Mont. I was frequently up the Nemadji as far as the bridge in question in this case.

Question. State what you found, if anything, with regard of there being any man kept at the bridge for the purpose of opening during the spring of 1883, generally.

Objected to by defendant's attorneys; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. I never saw a man there to open the bridge only once. Witness continues: I was there, off and on, all summer. The first time I was there in the spring was on the 5th of May. I was there when the Minnie La Mont came back and ran into the
67 bridge. This was between 11 and 12 o'clock, when he came down with the tow. When we got down within 200 feet or such a matter there was a man standing on the bridge, and they closed the bridge, and we saw a man on the bank—I believe it was the foreman of the gang—and he hallooed to keep the bridge open to let the tug get through, and they closed it and hallooed something back. I do not know what they said. We were with the current and the logs behind, and the captain had to shove the tug into the bank or go up against the bridge, and that would catch our smoke-stack; so he ran his boat alongside of the pier, and the logs all doubled up on the bank around there, and some of the logs were pulled out. It went along until the afternoon before they got straightened up again and we got off.

Cross-examination:

It was on the 5th of May the first time I was there that season. I do not know what time the boat reached the bridge, going up. The bridge was open when I rounded the bend, coming down. It closed suddenly. I did not see any train pass immediately. I did not see any train pass for about a half an hour. I was there frequently during the summer; sometimes three or four times a week. I got through the bridge by taking off my smoke-stack. I then did not need to have the bridge open and there was no need of a man, as far as I was concerned. The change in my smoke-stack was made in June.

68 Redirect examination:

It was a construction train.

JOHN WHEELAN, sworn as a witness on the part of the plaintiff, testified as follows:

I reside in Superior. In the spring of 1883 I was working on a section of the Northern Pacific railroad. The bridge on the Nemadji was on the section I worked on. There was no steady man kept there to open that bridge. Mr. Crawford, section boss, has charge of the bridge.

Cross-examination:

When I worked at Rice's Point or out towards the junction, on the line toward the N. P. junction, I do not know whether there was — man at the bridge; we worked all over. When I was not there I do not know whether there was a man at the bridge or not. There was no man left there. I saw Maxim over, looking for a man to open the bridge.

WALTER BURNES, sworn as a witness on the part of the plaintiff, testified as follows:

In 1883 I was master of the tug Eliza Williams. In my employ as tugmaster I was engaged on the Nemadji river, where this bridge is, 3 times in 1883. The first time was on the 23rd of May.

Question. State whether or not there was any man in charge of the bridge at that time or not.

Objected to by defendant's attorneys; objection overruled by the court; exception duly taken by defendant's attorney.

69 The first time I went up for Maxim I whistled for the bridge, and I was over two hours waiting for the bridge to be opened. The next time I went up it was not for Maxim it was for Brooks. I do not know whether they refused to open it, but they never came to open it, and we had to leave the scow right there, and the third time the same.

Witness continued: We whistled all the way from Duluth when wanted to open the bridge.

Cross-examination:

I do not know whether on the 23rd of May there was anything broken, but the bridge seemed to work hard.

SIMON JEFFREY sworn:

In April and May, 1883, I was engineer on the tug Nellie Cotton. I was on the Nellie Cotton on the 24th of April. When we came up to the Nemadji bridge there was no man to open it. We layed there as much as two or three hours and had to go back; could not go through at all. We whistled; nobody came to open it. We were there twice besides this 24th, when we were stopped at the bridge. On the first occasion we layed there two hours. The second time—the next trip—I cannot tell how long we were stopped. There was no one there to open the bridge. The third time I do not remember how long we were stopped. I did not pay much attention to it. I know simply one trip he layed there two or three hours and went up for a raft, and when we came down it was closed, and there was a train to pass over, they said, and there was an engine and caboose passed, and it was quite awhile before we could get it open, and we got mixed up with the logs and chains and we could not get through, and we layed there all night. The bridge opened after the train passed the next morning.

Cross-examination:

I cannot tell when it was we went through after this raft for the last time—the 2nd of May. We got back to the bridge before dark; I don't know whether it was before 6 o'clock.

ALPHONZO K. MAXIM was called as a witness on behalf of the plaintiff:

In 1883 we worked 11 hours a day. In 1882 we worked from daylight until dark.

Deposition of GEORGE BROOKS, taken on the 6th day of January, 1885, read in evidence on behalf of the plaintiff as follows:

I reside in Superior. I am a brick-maker on the Nemadji river, in Superior. My brick-yard is a mile and a half above its mouth. The Northern Pacific railroad bridge is about one-half mile above its mouth. During the season of 1883 I was using the Nemadji river for transferring bricks on scows towed by steam-tugs.

Question. Did you have any trouble in getting through said Northern Pacific railroad bridge while so using it?

Objected to by defendant's attorneys; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. Yes, sir. There was no regular bridge tender to open the bridge. When I wanted to go through the bridge I had to go

to the N. P. R. R. Company's agent, and he referred me to
71 the section boss; distance from the agent's office to the bridge was half a mile. Sometimes I could find the section boss and sometimes I couldn't. When the tugs brought up my scows to the bridge, after giving the particular signals with their steam-whistles which sounded five or six times, and no one offerred to open the bridge, they tied up my scows and left them for me to get up the best way I could. I was always troubled so when I wanted to pass the bridge.

Plaintiff rests, reserving the privilege to call two witnesses.

Thereupon the case for the defense was opened by J. D. Ensign, of counsel.

HENRY CRAWFORD, sworn as a witness on behalf of the defendant, testified as follows:

During the autumn of 1882 and the spring of 1883 I was foreman of the section of the Northern Pacific railroad in Superior. I began work on the 1st or 2nd day of November. In the spring of 1883 I had charge of the bridge over the Nemadji river, as foreman of the yard. I opened the bridge during the spring of 1883. I cannot tell the date of the first opening. Mr. Taylor was the depot agent at this point. I was under his orders. The first time I opened the bridge in the spring was for the tug. I was about an hour opening it; it had settled some. I do not know what tug it was. I remained in charge of the bridge during the whole season of 1883. I know the tug Nellie Cotton. I knew of her lying at the bridge all
72 night. The bridge was frequently open during the season. I never knew of a time that the tug layed above the bridge over night. I generally asked them when they were going up what time they were coming back, and they mostly always told me, but this time when I asked him he said he did not know whether he would be back to-night or not. I do not know who it was that answered me. It was some one on the boat. During the month of May my principal work was put in on the cut—on this side of the pile-work—putting in 1,170 ties in the cut on the other side of the bridge. I worked there purposely to be close to the bridge, so that I might attend the opening of it. Occasionally I was away a day. I always went to the bridge when I saw a tug coming. I was about always in sight. I don't remember of any complaints made to me in relation to detention of that bridge. I saw Mr. Maxim frequently; he never made any complaints, only occasionally told me about opening the bridge. The reason that boat layed up there over night was because they told me when they were going up that they did not — whether they would be down that night or not. I very often had the bridge opened when I saw tugs coming, and several times they came up there and did not want to go through. I asked the man at the wheel one time if he wanted to go through, and he says, "No; we are going to wait here for our tow." There was one occasion when the tug was coming down with a raft of logs and the wind

73 blew strong from the west, and it blew the raft over on the east side of the river. I think it is on the bend. We were standing on the bridge with the bridge open. The tug came down so her nose was close to the pier. There was a good deal of swearing done and a good deal of pulling done on the tug, and the man at the line behind he hallooed back to them to shove her off the shore, but they could not shove her off, the wind was so strong. Well, he pulled on the raft several times, and then he swore he would not pull another damn pound for the raft, and he unhitched from her and went up the river. I never knew the bridge to be opened unless I was there. There was no riprapping there, only piling. The channel was boomed around on the west side of the piers and between that and the other shore was filled up with logs. I could not swear positively who put it there, but I believe Mr. Maxim did. I saw them working at it—the men that I saw him have on the rafts coming back to this raft that turned around and went upstream. I asked the man at the wheel if they was coming back again and they did not make me any answer, and I says, "We will close the bridge and go to dinner, and we would come out right away after we eat dinner." I left then and returned immediately after dinner. The tug came down that afternoon and we stayed there until we let them through. There was one tug that did not require to have the bridge swung. There was one taking brick down for George Brooks—I do not know what was the name of it—that went
74 right through under the bridge.

Question. Was there an arrangement in relation to George Brooks that he should let you know when he wanted to go through?

Answer. He told me that he would let me know when he wanted to go through the bridge, and did so. I had four men working for me in the month of May. I relied on myself to look out for tugs coming.

Cross-examination:

My beat extended down as far as Connor's Point. I couldn't see the bridge from there. I couldn't see a tug coming through. My beat was five miles. The bridge opened very hard before it was repaired, in the spring of 1883. The number of men required to open it depended on how the wind was. After the first opening in the spring it usually took about a half an hour. I mind on one occasion I sent a man to find if the tug wanted to go through. They disappointed me a good many times. As far as the whistling is concerned, I ran to the bridge two or three times when they did not want to go through. Whenever I heard whistling, if they wanted to go through the bridge, I was always on hand. I do not know when the tug got there that the bridge didn't have to be opened.

Question. One of the witnesses stated that he whistled all the way from Duluth. Where did you think he wanted to go then?

75 Answer. He might have wanted to go to Niagara Falls, for all I know.

Mr. Brooks came to my home several times and told me he wanted

to go through such a time and asked me if I would be there. Mr. Whelan was one of my men and generally with me; not always. I left no man there as a bridge tender. I do not know the date when that boat I spoke of ran ashore. She did not run into the pier at all. She did not touch the pier, but came close to it. There was no train passing about that time. There was a curve, and a deep cut would keep the men out of sight of a tug coming to the bridge in some parts of it. I do not know but they could see a tug all the way in the cut.

Redirect examination:

I always gave enough attention to the stream to know when tugs were coming. There was whistling of tugs all over the bay all the time—tugs whistling for men and whistling for each other. Sometimes they were dredging. Tug whistling you could hear every day—pretty near every hour sometimes. There was no other business being transacted above the bridge that I know of, except this log business and the brick business.

Question. Now, in recurring again to this time that you saw the raft go aground and the tug went back and you had the bridge open and you closed it when you went up, was there any occurrence that bore any likeness to that any other time?

Answer. I never knew any other occasion except that.

76 Witness continues: I knew there was lots of whistling down at the mouth, and I twice walked down to the bridge when they did not want to go through. I was more watchful in relation to the bridge than to any other part of my business. (Witness details at length the position of the boom at the bridge and the logs there boomed.

Recross-examination:

I have seen boats go through on both sides of the bridge pier.

ANDREW HASTIL, sworn for witness in behalf of the defendant, testified as follows:

I live in Superior. Since April, 1883, I have been working on the railroad, under Mr. Crawford, on the section. While working in that capacity I assisted him in turning the draw-bridge across the Nemadji. I remember one afternoon a tug passed through the bridge and Mr. Crawford called out to it and asked whether or not it was coming back that afternoon. I did not hear any answer. I remember an occasion where a tug came down the river with a tow of logs, and the logs went on the bank, and when they could not get them off he went upstream, and we closed the bridge after that and went to dinner. We had the bridge open ready for them; we came straight back and waited for them to come along; we staid there until we let them through.

Question. Did you ever go there in company with Mr. Crawford

77 when you saw tugs approaching the bridge with the intention, as you supposed, of going through, and when you arrived at the bridge find they were tied up to the pier and did not want to go through?

Objected to by plaintiff's attorneys.

DEFENDANT'S ATTORNEY: We want to show their diligence; that they went there whenever there was the least sign of anybody wanting them to open the bridge.

Objection sustained by the court. Exception duly taken by defendant's attorney.

Witness continues: We were working there on the cut that spring quite awhile, on this side of the bridge, not much distance from it. From where we were working we could see the whole river and we had a view of the bay, and we kept watch for boats. We worked along the whole section, 5 to 6 miles.

JOHN WHELAN, sworn as a witness on the part of the defendant, testified as follows:

In the fall of 1882 I was watchman on the bridge, not in 1883. In the spring of 1883 I was working on the section under Mr. Crawford; I was with him in April and May, 1883. I recollect a tug passed up late one afternoon and Mr. Crawford asked them whether they were coming back that evening. I did not hear what answer was given. I remember an occasion when a tug came down the river with a raft attached, there was a wind blowed the raft over against the south shore. It seems to me that the tug tried to get it off but could not go it. Then they unhitched and went back upstream; the tugmaster said he would not pull another damn pound

78 until the raft was shifted from the shore. This was before dinner, about noon. Mr. Crawford told us to shut the bridge and go to dinner. We returned after dinner and remained until the tug went through. A great deal of our work that spring was in the cut on this side of the river, where we could see the river both above and below the bridge. I think it was the month of May. When we saw a tug approaching the bridge from either side we left our work and went directly to the bridge.

Question. Did you ever see a tug approaching the bridge and hasten there to open it and find that the tug came to the pier on either side and stop-?

Objected to by plaintiff's attorneys; objection sustained by the court; exception duly taken by defendant's attorney.

Cross-examination:

The tug was not far from the upper pier when the raft went ashore. I saw one other occasion when a tug got into the mud right under the bridge. The bridge was open and she came a little too close to the side of the river and got fast. It took some time to pull her off. It was right beside the centre pier.

Redirect examination:

I do not remember any other instance like that one. The Minnie La Mont was bringing down a raft which ran ashore on the other side.

EDWARD TAYLOR, sworn as a witness on part of the defendant, testified as follows:

During the year 1883 I was agent of the company here at Superior.
79 About the 24th of April, 1883, out on the platform, I had a conversation with Mr. Maxim. He came up from the draw and said he had a boat he would like to get through. I explained to him the bridge was spiked; that it would take some little time to get it open; that I would arrange it as soon as possible. That was the first time I got an application to open that bridge in the season of 1883. (Witness details conversation with Maxim on the 24th of April, 1883.)

Question. Was there any notice given to you or to any one else, to your knowledge, beforehand that they desired to have the bridge open before that day?

Objected to as irrelative; objection sustained by the court; exception duly taken by defendant's attorneys.

Question. Do you know what instructions were given to Crawford in relation to the care of this bridge?

Answer. Well, only those I gave him myself.

Question. What were those instructions?

Objected to by plaintiff's attorneys; objection sustained by the court; exception duly taken by defendant's attorneys.

Witness continues: Crawford and his men worked pretty much in the yards, in sight of the bridge and bay, generally, in May and June. Nobody ever made any complaint to me that the bridge was not being properly cared for.

Cross-examination:

The bridge was spiked in 1883 because some part of the bridge had been sent away for repair.

RENDOLD MCDONALD, sworn as witness in behalf of plaintiff, testified as follows:

80 I reside in Duluth. I am a riverman. In the spring of 1883 I was employed by Maxim, Le May and Crane, seeing to the logs that were towed from the sorting works down to the mouth of the river—that is, having charge of it—and afterwards I was foreman. On the 5th of May I saw the Minnie La Mont, when she was going down with a raft of logs, at the time the bridge was closed on her. I was on the raft, and we got within a short distance of the bridge, when they closed the bridge so that the boat could not get through. The tug got tangled up with the logs. I don't think the

tug was over 150 feet from the bridge when they closed the bridge. The tug couldn't turn round and go back with the raft.

This witness testifies as to the position of the shear boom and booms at the bridge and as to the difference in the cost of towing if done on the spring freshet or later in the season.

Cross-examination:

Some time after the bridge closed I saw a train pass. It might have been half an hour or an hour. I was back at the rear of the raft working to get a line ashore. There were five or six of us employed in straightening the raft out.

Plaintiff rests main case—not rebuttal; and thereupon defendant's counsel moves the court for a nonsuit upon the following grounds:

1. That the plaintiff is not shown to be the real party in interest.

2. Because it is not shown that there was ever any demand
81 made upon the defendant, by signal or otherwise, to open that bridge.

Motion overruled by the court. Exception by defendant.

Defendant rests.

ALPHONZO K. MAXIM recalled as a witness on the part of the plaintiff on rebuttal.

Witness handed a plan for the abutments and boom.

Question. Show where that shear boom runs and the pier is.

Objected to by plaintiff's attorneys; objection overruled by the court; exception duly taken by defendant's attorneys.

Answer. Just here is the railroad crossing. Here is the center pier and those here are the little piers. This boom was put in by the Northern Pacific Railroad Company when they first started the bridge (referring to boom testified to by former witnesses).

Witness continues: I could not say how late in the year 1883 we put in the pier from one spile to the other. We could not tow logs through without this boom. They could not put in the bridge without that boom.

Plaintiff rests.

82 The charge of the court to jury was as follows:

GENTLEMEN OF THE JURY: The plaintiff in this case, Irwin W. Gates, is assignee of Maxim, Le May & Crane, and the two have been spoken of during the trial indiscriminately as plaintiffs. The real plaintiff in this case is, as I have stated, Mr. Gates, by virtue of the assignment of a claim made to him before the commencement of this action. The cause of action arose by reason of transactions which affected Maxim, Le May & Crane and which Mr. Gates had nothing to do with until the cause of action had accrued in favor of Maxim, Le May & Crane, and after it had accrued then the assignment took place which makes Mr. Gates the proper party plaintiff here; but

in order to recover it is necessary that he, as plaintiff, should prove the rights which pertained to his assignors as Maxim, Le May and Crane, and then prove the assignment to him of those rights. This assignment is in evidence and is proven. There is no question before you in regard to the assignment. That being a question for the court, the court held the assignment good, and that it operated to vest the claim of Maxim, Le May & Crane in Mr. Gates. Therefore, that being a question for the court and disposed of, there is no question for you in that regard, and Mr. Gates stands here as the proper party plaintiff, entitled to recover, if anything, whatever Maxim, Le May & Crane would have been entitled to recover had they sued in his stead without making an assignment of their claim. The action is brought against the Northern Pacific Railroad Company to
83 recover damages sustained by plaintiff's assignors on account of the wrongful neglect and refusal, as it is claimed on the plaintiff's part, of the defendant company to open their draw-bridge over the Nemadji river and to afford the plaintiff's assignors an opportunity to navigate the river up and down in the prosecution of their business. The Nemadji river is a navigable stream. That stands not only proven, but admitted by the pleadings, and from that follows the right of all persons to avail themselves of the facilities which it affords for navigation. As a navigable stream it is a public highway to which all persons may resort for the purpose of navigation. It is unlawful for any one person or corporation to obstruct its navigation absolutely. Certainly, in a modified way and to a reasonable extent, a railroad having lawful authority to build its road over the stream, to bridge it, as it is conceded the Northern Pacific railroad had in this case, may cause such necessary obstructions as would result necessarily from the use of their bridge in a proper way.

To explain myself here, as an illustration, if the defendant company did not have authority to place a bridge over the stream they would have no right to put a pier in the stream for the purposes of a bridge; and while they had no such authority they would have no right even to obstruct a boat during the time necessary to open the draw-bridge; but with the authority to bridge a stream they must also have incidentally the power and authority to build piers to sustain the bridge and to sustain a proper draw-bridge over the channel, and must have power and authority to close the draw for
84 the purposes of the use of the bridge by their trains when passing, and any obstructions which would be incidental to such proper use would not be called an unlawful obstruction, they having power and authority to bridge the stream. But they do not necessarily and cannot exercise their right and powers in the premises so as to exclude or prevent the exercise of the right of navigation on the part of persons navigating the stream, and it is the duty of the company to so manage their bridge as to pass craft going up and down the stream with the least practicable delay consistently with the use which they have for the bridge themselves. They have no right to keep their draw closed so as to prevent craft from passing, except when necessary to keep it closed for the purpose of pass-

ing trains I do not mean to say, gentlemen, that they must necessarily keep the draw open at all times when trains are not passing, but I do mean to say that if they keep it closed it is their duty to furnish facilities for opening it so as to allow craft which wish to pass through the bridge the opportunity of doing so, and that without unreasonable delay. It might be a question possibly to be left to the jury as to what was reasonable in the case of a railroad, as to what was a reasonable use of the bridge, considering the risks to trains that might attend the bridge — open at all times when not employed for the passage of trains; but I think I may take judicial knowledge, and I shall in this case take the responsibility of so doing, of the fact that the proper use of a draw-bridge does not require it to be kept open at all times when not in use; that it may properly be kept closed if only facilities are afforded to craft to pass through it in navigating the stream; and as to facilities I shall instruct you, gentlemen, that it was the duty of the Northern Pacific Railroad Company, their bridge being closed, to provide that some one should be at the bridge or near it with whom the masters of craft ascending or descending the stream could communicate upon approaching the bridge and give notice of their desire to pass the bridge; that it was not the duty of masters of craft to go and make search on an expedition about the town among the offices or in some offices or among the employés of the company to find some one who would serve them by opening the bridge; that it was a reasonable obligation resting upon the defendant company to keep somebody at the bridge with whom communication could be had by those desiring to navigate the stream and pass to and fro through the bridge. I also instruct you that the defendant company would not be obliged to open the bridge to pass craft without notice on the part of masters of craft or those whose duty it was to give notice that they desired to pass, but that somebody should be there on the part of the Northern Pacific Railroad Company to whom this notice could be given and should be where they could be communicated with.

85

I hold that there is no obligation resting upon defendant company nor upon its employés at the bridge when they see a craft coming, either upstream or down, to divine that the craft desires to pass through the bridge (inasmuch as it may stop short of passing through the bridge) at any place, and the bridge tender, if there was such a man there, could not know what his intentions were. It is fair and right that he should have notice of the desire of the master of the vessel to pass through the bridge before he could be charged with neglect for failing to open it. It is not necessary to determine what this notice should consist in. I say "notice." The counsel for the defendant has asked me to charge, practically, that they were not obliged to open the bridge without a demand. I should so charge. It amounts to the same thing. He asks me to say, "The jury are instructed that the plaintiff is not entitled to recover in their action for damages occasioned to Maxim, Le May and Crane by reason of the failure to open defendant's bridge unless upon the occasion of such failure to open said bridge said Maxim,

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Le May & Crane demanded the opening of the bridge by the defendants to allow the passage of their tugs." That I have no objection to charging. I say, "Unless Maxim, Le May & Crane demanded the opening of the bridge." They probably mean just what the court would mean when it says, "That unless by a demand from the proper quarter." It may come from the master of the vessel, and should be made at the bridge, that it should be opened. They would not be responsible for the failure to open it without a proper demand. This demand may consist in whatever is a proper method of making it. Signals may be proper by blowing a whistle. We have no instructions in this suit. There has nothing been given in evidence as to whether any signals were agreed upon. It is probable that a proper system of signals will be the outgrowth of business upon the stream some time or other; but that is a matter
87 of convention between the Northern Pacific railroad and the public interested in navigating the stream, and in the absence of any signals agreed upon or understood they still should be accessible to some sort of application. That application may be made by word of mouth or in any other way that would give a person at the bridge representing the Northern Pacific Railroad Company to understand that a craft desired to pass, and, the application having been made for that purpose, they are bound to open the bridge so as to let them pass; and if the defendant company in this case failed to do that, under such circumstances they should be held liable for the damages actually suffered by persons who had a right to require the opening of the bridge and whose interest was thereby affected.

Now, the question of damages, in respect to which there has been a great deal of varying law, is perhaps the only difficult question in this case; and, whether we should be so fortunate as to agree with either party or with the views of any court of review or not, we must, at least, have a certain rule of damages in this case, and the court will instruct you as to what it deems to be the law affecting the case. A clear measure of damages in the case of the delay of the tug in the employ of Maxim, Le May & Crane would be the cost of the tug hire and the men who were kept idle directly by means of the delay. That would be a clear standard and afford a definite rule of damages. Such delay, after notice to open the bridge, as would be incident to the opening of it by proper means and facilities for opening it, which the railroad were bound to keep, would not be
88 delay on account of which damages could be recovered, but all delay beyond that would be delay on account of which damages could be recovered by the party injured, and should fairly include the necessary pay of the tug, the necessary pay of the men in the employ of the plaintiff's assignors, who were kept idle directly by means of that delay, and that, as has been said by one of the counsel, can be ascertained as a definite amount in figures, and would come within what might be called liquidated damages. The plaintiff would also be entitled, if he recover anything, to recover legal interest at seven per cent. from the time that the damage accrued.

Another claim for damages set up here is grounded upon the fact,

as it is alleged, that the plaintiffs, by the defendant's fault, were not able to use the river in their business for a space of time. From what date is it claimed?

WHITE: From the 24th of April to the 24th of May. I do not claim we could not use it at all, but we could not use it profitably.

COURT: Well, that they could not use the river, as they claim, for a space of time—as they claim, for a month or thereabouts—at a season of the year when it would have been much more profitable to use it than it was later, from the fact that they had to get a tug from the lower lake that could go under the bridge, by reason of a joint in its pipe. And considerable has been said about a contract which the plaintiff's assignors had for getting out logs, and that they lost certain profits which they would have otherwise made on that contract; and there has been a discussion as to whether those
89 profits should be recovered as a measure of damages.

I have already stated in the early part of the trial and I state now, gentlemen, that the question of profits upon that contract cannot come before you. To put it in that shape, as a question of profits, it seems to me, would only complicate it, and I do not think there is occasion in this suit to consider it as a question of profits upon that contract. A much more easy way to put the matter is, in my view, simply to say that it appears by the contract which was put in evidence that Maxim, Le May & Crane had business above the bridge for the purpose of sorting logs and towing them below, and this contract is not in evidence for any other purpose than to show that Maxim, Le May & Crane had business there. It probably was not necessary that it should have come in evidence for that purpose; it might have been shown otherwise; but it did serve to show that they were interested and had a right to go above the bridge on their business, for the purpose of sorting and getting out logs, and, so far as that is concerned, the contract is properly in evidence; and now what they were to make by that contract I do not think you have anything to do with. I shall simply consider it and you are to consider it, if you shall consider this particular question at all, in the light of what it would have cost them to do that business at one time of the year when they were ready to do it and when, as they claim, they were prevented from doing it, and what it would cost them to do it at another time of the year when they did do it, and whether it would cost them more to do it at the time when they did do it; and the additional
90 cost of doing that business, if any, would be a legitimate measure of damages, and this can be considered without reference to any contract or profits on a contract. But the question that arises here is whether they can recover. That is a question I have to decide, as a court, as to whether they can recover at all for damages on account of being prevented from using the river during the season of high water—that is, whether the fall of water was a thing for which the Norther- Pacific Railroad Company should be held responsible. I have in my mind adopted a rule in that case, which I will state to you, as the proper rule to govern you. I have determined that the plaintiffs would have not right to make a claim

upon the Northern Pacific Railroad Company for damages which might arise on account of some fortuitous or unlooked-for event, not necessarily connected with the delay, or with the refusal of the defendants to open the bridge; and to illustrate what I mean by that, the fall of the water is not a necessary consequence of the refusal to open the bridge; but it may be true that the high water in the Nemadji river is a matter of such regular and ordinary occurrence and a matter so connected with the business of assorting and towing logs that Maxim, Le May & Crane or persons engaged in the same business would have a right and might reasonably adjust their business with reference to the high water, with reference to availing themselves of the season of high water. I leave that for you to determine from the evidence, gentlemen of the jury, whether that change in the stage of the water and in the condition of the
91 river is of that character. The rule may seem artificial to you, but still it is the rule adopted in this action, that if this change in the condition of the water was a mere chance—if we might use the term, a freak of nature—coming from a mere hazard of the weather, something not usually or ordinarily occurring, then it would belong to that class of accidents the result of which must remain and lay where they fall; but if, on the contrary, it is one of the regular and ordinary features of navigation on this river, one of the regular and ordinary incidents of the business of sorting logs here, that high water in the spring could be expected, and the business could be done cheaper at that time, then the plaintiffs had a right to avail themselves of that advantage; and if they were prevented by the wrongful act of the defendant from availing themselves of that facility existing at that time, then the loss incurred on that account is the increased expense of doing the business and is an item of damage which they would have a right to recover for; and, as I said, to which class of occurrence that fall in the river must be assigned is for you to determine from the evidence in this case, gentlemen. If, as I said, it was a mere fortuitous event not regularly or ordinarily occurring, the plaintiff is entitled to no damage on account of it. If, on the contrary, it was of a different character, such as I stated, one with reference to which they had a right and might reasonably be expected to act and regulate their business with reference to, then it forms a ground for a claim for damages if they were prevented from availing themselves of the high water in the season of high water. But,
92 in order that the plaintiff may recover on that ground, it must appear, further, gentlemen, and it is essential that it should appear, that they were deprived of that advantage by the wrongful act of the defendant; and they cannot recover for any damage sustained on account of being so deprived of that advantage, only to the extent that they were so deprived by the fault of the defendant. And in proving the damages, or in proving the other acts, the affirmative is on the plaintiffs; it is for them to show the wrongful act of the defendant; it is for them to show the damage that accrued, if there was any damage accrued, from that act; and hence I leave you to determine, gentlemen, as a question of fact, from the

evidence, whether the plaintiffs' assignors were, by the wrongful act or neglect of the defendant to open their bridge, deprived of the use of that high water. If you shall determine that they are entitled to recover on that ground, within the rule I have heretofore stated—that is, if you shall determine that they would otherwise be entitled to recover—I leave you to determine whether that was occasioned by the neglect of the defendant, and to determine that you must determine that the plaintiffs could not, within the period which they claim they were deprived of this advantage by reason of the high water, have used the river. In order to determine that you will have to determine that there was no such means provided by the defendant company for opening the bridge as made it practicable for plaintiffs' assignors to prosecute their business during the
93 season they speak of that they were deprived of its use, and it is for them to make that appear. I think the plaintiffs' assignors had no right to go away and say they were discouraged. That would not justify them. They would have no right to intermit their efforts to prosecute their business and charge the increased cost of doing it afterwards, at a later season, when it could not be so advantageously done, upon the defendant company. If, as a matter of fact, they could have used the river during that interval of time, got through the bridge in a proper way, and whether they could or not depends on your determination of the evidence as to whether there was at the bridge those facilities which the plaintiffs had a right to claim and expect to enable them to pass the bridge; if there was, then it will not do for the plaintiffs to say they were discouraged. What I mean by that, gentlemen of the jury, is that the fault of the Northern Pacific railroad one day or week, and their liability to pay damages on account of that fault would not justify the plaintiff in charging the defendant for damage accruing some other time, if, as a matter of fact, that fault would not have been repeated or would not have occurred at the other times when they might have gone through the draw and used the river. Hence, if you determine, as a matter of fact from the evidence in this case, that the plaintiffs could have got a beneficial use of the bridge or a use of the river—I mean at the bridge—even at the expense of some delay, if it is less than they would have lost by intermitting their efforts altogether, they cannot re-
94 cover the increased cost of doing it afterwards over and above what it would have cost them had they been able to have — an uninterrupted use of the river—had the proper facilities been afforded them. They can only recover their actual loss in that respect, not the whole difference between what it would have cost them to do the business at the time when they did do it later, after getting the tug Hope, and what it would have cost them at a time when the river was at a high stage of water. Neither does the fact, as I conceive, that the tugs refused to go there cut any figure in this case. No question as to damage done to tugs has anything to do with the delay. The plaintiff is here claiming damages from the fact that he had to pay tugs during the delay, and we have no concern with the motives, as I can see, or the reason which may have

operated on tugmasters to prevent their doing the business. As for the plaintiff's assignors, so far as we have anything to do with it, if they get their pay that is all they could ask. The only question, then, as a matter of fact, is whether they could have done their business during the time in which they say they were deprived of doing it profitably; whether they could have done it without waiting; whether it was practicable for them to do it, and facilities existed by which they could use the river in going up above the bridge and down below it as they had occasion to do.

The counsel desires that you shall find specially on two
95 points—first, the amount at which you assess the damage on account of the loss of time of tugs and men employed by plaintiff's assignors while delayed by the neglect or refusal of the defendant to open the bridge when the stream at that point was fit for such navigation by such assignors; second, the additional damage resulting to the plaintiff's assignors from such acts of the defendant for the delay, hindrance, and consequent loss to them in carrying on their business.

The additional damage, that I understand as referring to the ground of damage which we have just been discussing. Whether you allow any damage on this second count will depend upon whether you find, under the instructions of the court and the evidence in the case, that the plaintiffs are entitled to damage on the ground of their being obliged, as they claim, to delay their business until a time when it could not be so cheaply done. This would exclude, I think, the claim that is made on the part of the plaintiffs for damages growing out of the events of May 5th. The plaintiffs would be entitled to all damages incurred by reason of the neglect of the defendant in opening the draw, resulting in the delay of the tug, for which the plaintiff's assignors had to pay, and for the wages of the men who were thereby necessarily kept idle.

They were deprived of doing their own work. I think it stands on the same ground. Their profits that they might have earned
that day, I think, should be excluded from your consideration,
96 because it does not appear but that, so far as that is concerned, that might not have been earned some other time—that is, there is no sufficient evidence to show that fact, so far as the profits of the business are concerned, their real damage being their delay. It does not appear that the same profits might not have been earned some other time. It is all included in the consideration of the loss of the plaintiffs by reason of their not being able to avail themselves of the high water, if there was a loss for which the defendants are liable on that ground, within the evidence and the instructions of the court. I do not think of anything else that it is necessary to charge you, gentlemen.

The defendant excepts to the charge of the court to the jury as follows:

1. To so much of the charge as instructs the jury that the assignment by Maxim, Le May & Crane to Irwin W. Gates transferred the

cause of action to said Gates, or that Irwin W. Gates is the real party in interest in this action.

2. To so much of the charge as instructs the jury that it was incumbent on the defendant to keep a watchman continually on defendant's bridge across the Nemadji river.

3. To so much of the charge as instructs the jury that the plaintiff could recover damages in this action for his inability to
97 profitably make use of the waters of the Nemadji river from April 24th to May 24th by reason of the supposed obstructions to the navigation of said river by defendant's bridge.

4. To so much of the charge as instructs the jury that the defendant in this acition is chargeable for the increased expense of doing their business on the Nemadji river after the subsidence of the waters in the spring of 1883.

5. To so much of the charge as instructs the jury that the defendant is responsible to the plaintiff in this action for the consequences of the fall of the water in the Nemadji river in the spring of 1883.

6. To so much of the charge as instructs the jury that the defendant is liable to the plaintiff for the damages he sustained by reason of his inability to procure tugs capable of navigating the waters of the Nemadji river.

7. To so much of the charge as instructs the jury that the plaintiff can recover in this action for any damages beyond the actual cost to Maxim, Le May & Crane of the tugs and men while they were actually detained at defendant's bridge.

The defendant asked the following instructions to be given to the jury:

1. The jury are instructed that if they shall find from the evidence that tugs in the employ of Maxim, Le May & Crane were detained at the defendant's bridge over the Nemadji river by
98 reason of the negligent failure of the defendant to open the draw of said bridge upon the demand of said Maxim, Le May & Crane or their servants, then the plaintiff is entitled to recover in this action the actual cost to Maxim, Le May & Crane of the tugs and men so detained during such detention.

Instruction refused. Exception by defendant.

2. The jury are instructed that the plaintiff is not entitled to recover in this action any damage sustained by Maxim, Le May & Crane by reason of their inability to procure tugs capable of navigating the Nemadji river above defendant's bridge.

Instruction refused. Exception by defendant.

3. The jury are instructed that the plaintiff is not entitled to recover in this action for any damage sustained by Maxim, Le May & Crane by reason of the subsidence of the waters in the Nemadji river.

Instruction refused. Exception by defendant.

4. The court instructs the jury that if they shall find from the evidence that there were two or more causes concurring to prevent

Maxim, Le May & Crane from realizing profits on their contract to bring down the logs, as mentioned in the complaint, and that one of those causes was the detention of their tugs at the defendant's bridge and the other was the inability of the said Maxim, Le May & Crane to procure tugs capable of navigating the waters of
99 the Nemadji river above said bridge, and another was the low stage of the water in said river, and that without the concurrence of all of said causes or of two of them the said Maxim, Le May & Crane would have realized such profits, then the plaintiff cannot recover in this action any profits the said Maxim, Le May & Crane were so prevented from realizing.

Instruction refused. Exception by defendant.

5. The jury are instructed that the plaintiff is not entitle- to recover in this action for damages occasioned to Maxim, Le May & Crane by reason of the failure to open defendant's bridge unless upon the occasion of such failure to open said bridge said Maxim, Le May & Crane demanded the opening of the bridge by the defendants to allow the passage of their tugs.

Instruction refused. Exception by defendants.

6. The court instructs the jury that it was the duty of Maxim, Le May & Crane to have avoided damage by delay at defendant's bridge over the Nemadji river if they could have done so; and if the damages claimed in the complaint could have been avoided at the expense of putting a joint in the smoke-stack of any tug in their employ it was their duty to have done so, and in that case the plaintiff would be entitled to recover in this action only for the expenditure that would have been necessary to put such joints in such smoke-stacks and such actual damage as they would have suffered
100 by reason of the delay in putting in such joints.

Instruction refused. Exception by defendant.

7. The court instructs the jury that the plaintiff cannot recover any of the damages claimed in this action on account of profits on the contract in the complaint set forth, because they are too remote and not the proximate result of defendant's acts.

Instruction refused. Exception by defendant.

8. If the jury shall find from the evidence that the profits claimed in the complaint were contingent or depending upon facts and circumstances beyond plaintiffs' control, then such profits cannot be recovered as damages in this action.

Instruction refused. Exception by defendant.

9. The court instructs the jury that if there were tugs capable of navigating the Nemadji river above defendant's bridge and Maxim, Le May & Crane failed or neglected to hire such tugs, the plaintiff cannot recover damages in this action for any delay occasioned by such neglect or refusal.

Instruction refused. Exception by defendant.

10. It being shown by the evidence that the plaintiff, Irwin W. Gates, is not the owner and holder of the claim sued upon and has

no interest in the same, but that said claim was assigned to
101 said plaintiff for the purpose merely of bringing this action, he agreeing to apply the proceeds thereof in payment of certain debts of Crane & Maxim, two of said assignors, in his hands, and pay the surplus to said Maxim, Le May & Crane, who are the real parties in interest in this action, the plaintiff cannot recover and the defendant is entitled to a verdict under the direction of the court.

Instruction refused. Exception by defendant.

11. The jury are instructed that the plaintiff is not entitled to recover in this action for any damage sustained by Maxim, Le May & Crane by reason of their detention at the defendant's bridge over the Nemadji river, together with either the low stage of the water in said river or the inability of said Maxim, Le May & Crane to hire tugs capable of navigating said river above defendant's bridge.

Instruction refused. Exception by defendant.

The defendant asked that the jury be allowed to take with them into their consultation room such of its written instructions as had been given by the court.

Refused by the court. Exception by defendant.

Upon the rendition of their verdict by the jury defendant's attorney moved for a new trial upon the minutes of the judge.

Motion overruled. Exception by defendant.

102 DOUGLAS COUNTY, *ss:*

Circuit Court.

IRWIN W. GATES *vs.* NORTHERN PACIFIC RAILROAD COMPANY.

I hereby certify that the foregoing bill of exceptions was settled before me this 22nd day of June, 1885, at 10 o'clock a. m., pursuant to a stipulation between the parties; that the same contains all the testimony introduced on the trial before me of the above-entitled action and all the exceptions taken by the defendants in said case, together with the instructions given and refused by the court and the exceptions thereto filed by said defendant.

S. H. CLOUGH,
Circuit Judge.

(Endorsements:) Filed this 24th day of June, 1885. Charles Lord, clerk (cir. c't). Filed July 2, 1885. Clarence Kellogg, clerk of sup. c't Wis.

It is hereby stipulated that the foregoing bill has been agreed upon subject to the court deciding upon the 11th instruction as included in the bill having been granted or refused, and upon settling that the court may settle the bill as it stands.

June 16, 1885.

S. F. WHITE,
Counsel for Pl'ff.
W. A. HAMILTON,
Att'y for Defendant.

103 (Endorsements over:) Stipulation to settle bill of exceptions. Filed June 24, 1885. Ch's Lord, clerk, by H. E. Loffette, deputy. W. A. Hamilton, att'y for def't. Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis.

STATE OF WISCONSIN, } ss:
County of Douglas, }

In Circuit Court.

I, Charles Lord, clerk of the circuit court in and for said county and State, do hereby certify that the annexed papers were filed in my office on the days endorsed thereon, are all the original papers on file in my office in an action entitled Irwin W. Gates, plaintiff, against Northern Pacific Railroad Company, defendant, and that the same are transmitted to the supreme court in pursuance of an appeal, as is shown by the record to have been perfected June 9, 1885.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 29th day of June, A. D. 1885.

[SEAL.] CHARLES LORD, *Clerk.*

(Endorsed:) Filed July 2, 1885. Clarence Kellogg, clerk sup. c't Wis.

104 And afterwards, to wit, on the 16th day of July, A. D. 1885, came the said respondent, by his attorney, and filed in this court his certain notice of argument herein in the words and figures following:

Notice of Argument.

In Supreme Court, State of Wisconsin.

IRWIN W. GATES, Plaintiff,

vs.

NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

Appeal from circuit court, Douglas county.

SIR: You will please take notice that the issues of law in the above-entitled cause will be brought on for argument and trial at the next regular term of the court aforesaid, appointed to be held at the capitol, in the city of Madison, Wisconsin, on the eleventh day of August, 1885, at the opening of said court on that day or as soon thereafter as counsel can be heard.

Yours respectfully,

WHITE & BOWER &
STEPHEN BACON,
Attorneys for Plaintiff.

Dated July 10, 1885.

To W. A. Hamilton, Esq., attorney for defendant.

(Endorsements:) Due service of within notice is hereby admitted, at Superior, Wisconsin, this eleventh day of July, A. D. 1885. W. A. Hamilton, attorney for defendant. White & Bower & Stephen Bacon, attorneys for plaintiff. Filed July 16, 1885. Clarence Kellogg, — sup. c't Wis.

105

And afterwards, to wit, on the 23d day of July, A. D. 1885, the following additional papers were received from the clerk of the circuit court of Douglas county and filed in said cause in the words and figures following—that is to say:

For and in consideration of the sum of fifteen hundred dollars to me in hand paid by E. B. Crane, of Superior, Wis., the receipt whereof is hereby acknowledged, I hereby sell, assign, transfer, and set over unto the said E. B. Crane and his assigns all of my rights and demands accrued and hereafter to accrue under and by virtue of one certain written agreement, duly executed and delivered in duplicate July 29, 1882, by and between A. A. Maxin, Jr., E. F. Le May, and Alfred Merritt under the firm name and style of Maxim, Le May & Merritt, parties of the one part, and the firms of Peyton, Kimball & Barber, Duncan, Gamble & Co., Cutler, Gilbert & Pierson, and A. M. Miller, parties of the other part, relating to the rafting of logs from Nemadji river, Wis., up the Bay of Superior, and the delivery thereof, as in said contract specified.

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And also of, in, and to another certain written agreement, duly executed and delivered in duplicate on said July 29, 1882, by and between said firm of Maxim, Le May & Merritt and the Nemadji Boom Company, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Wisconsin, party of the other part, relating to the assorting, rafting, and holding for delivery of pine logs, as in said last-mentioned contract specified, hereby authorizing said Crane to take and hold my place in said firm of Maxim, Le May & Merritt under said contracts, as an equal partner in said firm, in every particular as fully as I might or could do before the signing of these presents, hereby constituting said Crane an equal partner in said firm in my place and stead, and all parties interested directly or indirectly in said contracts are hereby authorized and directed to treat said Crane as such partner in said firm, he having by these presents assumed the full responsibility of a partner therein and agreed to release me from all further liability therein.

Dated at Duluth, Minn., this 18th day of Oct., 1882.

Witness my hand and seal the day last above written.

ALFRED MERRITT. [SEAL.]

In presence of—
JOHN PETERSON.
C. M. WILSON.

STATE OF MINNESOTA, } ss:
St. Louis County, }

Be it remembered that on this 18th day of October, A. D. 1882,

107 personally appeared Alfred Merritt, to me well know- to be the person who executed the foregoing instrument, and he acknowledged that he executed the same as his free act and deed for the uses and purposes therein expressed.

[SEAL.] C. M. WILSON,
Notary Public, St. Louis Co., Minn.

I hereby agree that the conditions of the above instrument shall be carried out in full.

Dated Oct. 18, 1882.

A. A. MAXIM, JR.

(Endorsements:) Assignment from Alfred Merritt to E. B. Crane. J. W. Gates against N. P. R. R. Co. Exhibits offered in evidence. Filed Jul. 23, 1885. Clarence Kellogg, clerk sup. c't Wis.

Circuit Court, Douglas County.

IRWIN W. GATES, Plaintiff,

against

THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To the Northern Pacific Railroad Company and to William Hamilton, attorney for said defendant:

SIR: You are hereby notified that the deposition of George Brooks, of the town of Superior, in said county of Douglas, will be taken before James Newton, one of the justices of the peace in and for
108 said county, at his office, in the court-house, in the said town of Superior, on the 6th day of January, A. D. 1885, next, at ten o'clock in the forenoon, to be used on the trial in the above-entitled action on the part of that plaintiff, for the reason and cause for taking deposition of the said George Brooks is that the said Brooks is about to go out of the State, not intending to return in time for the trial of the above-entitled cause or the hearing therein, at which time and place you are hereby notified to appear and put such interrogatories as you may think fit.

Dated this 2nd day of January, 1885.

WHITE & BOWER, WITH
STEPHEN BACON,
Attorneys for Plaintiff.

(Endorsements:) Service of a copy of the within notice on the 2d day of January, A. D. 1885, at 5 o'clock p. m., is hereby admitted. W. A. Hamilton, defendant's att'y. Personally served on —— —— this 2nd Jan., 1885, by deliver- to him a true copy thereof. Chas. Lord, Jr., constable. Fee, 25c. Filed Jan. 6, 1885. James Newton, J. P. Notice to take deposition of George Brooks. To. W. A. Hamilton, att'y for def't. White & Bower, with S. Bacon, att'y- for plaintiff.

109 STATE OF WIS., } ss:
Douglas County, Town of Superior, }

In Justice Court, before James Newton, Esq., Justice of Peace.

IRWIN W. GATES, Pl'ff,

vs.

THE NORTHERN PACIFIC RAILROAD CO., Def't.

Deposition of George L. Brooks, a witness for the plaintiff, taken before me, at my office, in Superior, in said county and State, on the 6th day of January, 1885, commencing at 10 o'clock a. m., pursuant to the annexed notice, to be used on the part of the plaintiff in an action pending in circuit court in & for Douglas county, wherein Irwin W. Gates is plaintiff & The Northern Pacific Railroad Co. is defendant.

The said witness, being first duly sworn to testify the truth, the whole truth, and nothing but the truth relative to said cause, in answer to oral interrogatories propounded by the plaintiff or STEPHE-BACON, who appears for the plaintiff, deposed and made answer as follows:

My name is George L. Brooks, my age is 38, and I reside in Superior. I know the parties; have known the plaintiff 22 years, the defendant 3 years.

—. What is your occupation?

Ans. A brick-maker, at Superior, on the Nemadji river, which is a navigable stream.

—. Whereabouts in the said river is the place you manufacture bricks?

Answer. About one mile and a half above its mouth.

—. How do you know that it is a navigable river?

Answer. By vessels running up & down from the mouth to my brick yard & above it.

110 —. Navigable for which class of vessels?

Answer. Any vessels drawing 6 feet or less, to my yard in the channel of the river.

—. How wide is the channel of the river?

Answer. From 1 to 2 hundred feet.

Quest. Is it navigable for larger class of vessels to points on said river above the mouth?

Answer. Yes.

Quest. How far up the river — a vessel drawing 7 feet of water?

An. About one mile.

Quest. How long have you been navigating this river?

Ans. At least 10 years.

Quest. Where on that river is the Northern Pacific Railroad Co. bridge located?

An. About one-half mile above its mouth.

Quest. During the season of 1883 were you using the said Nemadji river for transporting bricks?

An. Yes.

Quest. How?

An. On scows towed by tugs.

Quest. What class of tugs?

An. Steam-tugs.

Quest. Where were they towing the scows?

An. Up and down the river, from the mouth of the river to my brick yard.

Quest. Did you have any trouble getting through the said Northern Pacific Railroad Company's bridge while so using it?

An. Yes.

Quest. What was the trouble?

Ans. There was no regular bridge tender to open the bridge, and when I wanted to go through the bridge I had to go to the N. P. R. R. Co. agent, & he referred me to the section boss, & the distance from the bridge to the agent's office was a half mile. Sometime I could find the section boss at his house or about town & sometimes I could not find him. When the tugs brought my scows to the bridge, after giving the proper signals with their steam whistle (& 5 or 6 times) & no one offered to open the bridge, they tied
111 up my scows & left them.

Quest. How often were you troubled in that way getting through the bridge.

Ans. I was always troubled so when I wanted to pass the bridge.

Quest. How often did you want to get through the bridge in the year 1883?

Ans. I commenced using it in the spring of 1883 & have used it so 25 times or more during said season.

Quest. ——.

W. A. Hamilton, appearing for the defendants, propounded no interrogatories.

GEO. L. BROOKS.

STATE OF WISCONSIN, } ss:
Douglas County, }

I, James Newton, justice of the peace in and for said county, do hereby certify that the above deposition was taken before me, at my office, in the town of Superior, in said county, on the 6th day of January, 1885, at 10 o'clock a. m.; that it was taken at the request of the plaintiff upon written interrogatories; that it was reduced to writing by myself; that it was taken to be used in the action of Irwin W. Gates *v.* The Northern Pacific Railroad Co., now pending in circuit court, and that the reason for taking it was that the notice, of which a copy is hereto annexed, was served upon W. A. Hamilton, attorney for said defendants, on the 2d day of January, 1885; that said deponent before examination was sworn to testify the truth, the whole truth, & nothing but the truth relative to said

cause, & said deposition was carefully read to said deponent & then subscribed by him.

Superior, Jan. 6, 1885.

JAMES NEWTON,
Justice of Peace.

(Endorsements:) Deposition of George L. Brooks. Filed this 6th day of January, 1885. Charles Lord, clerk. Filed July 23, 1885. Clarence Kellogg, cl'k sup. c't, Wis.

112 Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on the eleventh day, of August, A. D. 1885, on the ninth day of the term, to wit, on the eighth day of September, A. D. 1885—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassoday, associate justices, of said court—the following proceedings were had, *inter alia*, to wit:

Douglas Circuit Court.

IRWIN W. GATES, Respondent,
vs.
THE NORTHERN PACIFIC R. R. CO., Appellant.

And now, at this day, come the parties herein, by their attorneys, and this cause having been argued by S. F. White, Esq., for the said respondent and submitted for the said appellant on the printed case and brief, *and* the court, not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

Be it remembered that at a term of the supreme court of the State of Wisconsin, begun and held at the capitol, in Madison, the seat of government of said State, on the second Tuesday, to wit, on
113 the eleventh day, of August, A. D. 1885, on the tenth day of the term, to wit, on the twenty-second day of September, A. D. 1885—present, Orsamus Cole, chief justice, and William P. Lyon, Harlow S. Orton, David Taylor, and John B. Cassoday, associate justices, of said court—the following proceedings were had, *inter alia*, to wit:

Douglas Circuit Court.

IRWIN W. GATES, Respondent,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

This cause came on to be heard on appeal from the judgment of the circuit court of Douglas county and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Douglas county in this cause be, and the same is hereby, affirmed with costs against the said appellant, taxed at the sum of fifty-seven and $\frac{75}{100}$ ($57.75) dollars.

Upon the rendering and entering of which said judgment the following opinion of the court by Orton, J., was filed in the words and figures following—that is to say:

Opinion.

IRWIN W. GATES, Respondent,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

ORTON, *J.:*

The plaintiff sued as assignee of the firm of Maxim, Le May & Crane. The assignment was absolute in consideration of applying the net proceeds of the claim in suit to the payment of certain claims against the said firm and paying over the overplus to said firm. The appellant company constructed a bridge on the line of its road over the Nemadji river, a short distance from its mouth, where it empties into Lake Superior at Superior City, with a draw in it to admit the passage of boats and vessels and other craft navigating said river. The assignors were engaged during the years 1882 and 1883 in the business of receiving logs, which were run down said river at a point about two miles above said bridge, and there assorting them and joining them together in rafts and towing the same by means of tug-boats into the Bay of Superior and thence to the mills of their owners. While they were engaged in so sorting, booming, rafting, towing, and delivering logs during the fall of 1882 they were delayed by the neglect and refusal of the defendant company to open the draw of said bridge or to allow the same to be opened on the following times and occasions: On Sept.
2d, the tug John Pridgeon, in their employ, with a tow of
115 logs, a period of 4 hours; on Sept. 29th, 24 hours; during
the spring of 1883, April 24th, the tug Nellie Cotton, in the same manner, 6 hours, and on April 30th, 2 hours; on May 2d, the tug John Martin, 14½ hours, and on May 5th, tug Minnie Le Mont, 2 hours. By these delays the assignors lost in the payment of the tugs a certain amount per hour and in the payment of their employés so kept idle a certain amount per hour. By these delays in the spring of 1883 the assignors were unable to retain and obtain tugs for their necessary work, and were compelled to go a long distance to obtain a tug with a joint in its smoke-pipe, so as to be lowered and made to go under said bridge with the draw closed, and by such delays their work under certain contracts for delivering logs was so hindered and impeded during the spring freshets and high water in said river that they were compelled to do a large part thereof, which might otherwise have been done at such favorable season, later in the season, at a time of low water, which cost them twenty-three cents per thousand feet of logs more than it would *if such work could and would* have cost, but for such delays, during such high water, and they thereby suffered so much loss and damage. These are the main facts stated in the complaint.

We have carefully read the testimony, and we are satisfied that

the verdict of the jury, both as to the amount of the plaintiff's damages and the cause thereof, was warranted by competent testimony, and it is useless to say more on the merits of the case or questions of fact.

116 A demurrer to the complaint was overruled, and this is assigned as error, but, inasmuch as the same questions were raised on the trial and in instructions to the jury, such error need not be specially considered.

The special exceptions will be disposed of by the consideration of the questions of law involved:

1st. Did the assignment to the plaintiff of the cause of action entitle him to sue alone? The assignment certainly entitles him to the moneys to be recovered in the action. It is correctly said by the learned counsel of the respondent in their brief that the reasoning in the case of Hooper *v.* The Railway, 27 Wis., 81, would seem to confer such right on the plaintiff as assignee. In that case the shipper or consignor was allowed to sue alone for lost goods for the reason that the consignee did not object, and without his objection it was presumed that it was with his knowledge and consent, and that the suit was prosecuted for his benefit by the consignor as his trustee. The case of Smith *v.* Railway Co., 23 Wis., 267, seems to be in point. The assignor of property and choses in action to pay debts brought the suit. Dixon, chief justice, said in the opinion: "The interest of the plaintiff is residuary and equitable merely. He has no legal interest in the claim, the title being vested absolutely in the assignee, who alone can bring suit upon it and control the proceedings for the collection." In Woolscraft *v.* Norton, 15 Wis., 198, an account was placed in the hands of another to collect

117 the same and pay the debt of the owner of the account to himself. It was held that such other person was the proper person to sue. See also Allen *v.* Kennedy, 49 Wis., 549; Waterman *v.* Railway Co., 61 Wis., 465; McArthur *v.* Canal Co., 34 Wis., 139; Vincent *v.* Railway Co., 21 N. W. Rep. (Iowa), 9. From these authorities and others which might have been cited and from principle it is clear that the plaintiff had the right to sue.

2d. Was it the duty of the assignors to have notified the company to open the draw of the bridge every time they wished to pass through with the tug-boats? If this bridge with the draw closed was an unlawful obstruction of the river, except when it was necessary to be used by the defendant company, then it was a nuisance, and the company created it and was responsible for it. In such cases no notice to remove or abate it was necessary. Slight *v.* Gutzlaff, 35 Wis., 675, and cases cited. When the draw was closed it was a complete obstruction to the navigation of the river by tug-boats as they are usually and generally constructed, and a nuisance *per se*, and there is no principle which could exonerate the company from removing or abating it without notice at any time when it was necessary or proper for the river to be so used. On this question the late case of Weisenberg *v.* Winneconne, 56 Wis., 667, and Barnes *v.* Racine, 4 Wis., 454, are in point. The obstruction and delay would seem to be sufficient burthen upon navigation without requiring a suffering

party to delay and be damaged still more by the time required to give the offending party notice to abate the nuisance.

118 3d. Ought the assignors to have opened the draw every time they wished to pass the bridge with a tug-boat? If any such duty was imposed upon them it was by virtue of their right to abate the nuisance and not suffer unnecessary damage by the delays occasioned thereby by reason of its continuance. This principle would scarcely be a safe one in such a case where the company had the right to keep the draw closed when necessary for their use in running railway trains across the bridge. It follows, then, that if the assignors ought to have opened the draw at such times as a temporary and necessary abatement of the nuisance as to them it was their duty also to close it again after they had passed through, and thus became a party responsible to other persons navigating the river in a similar manner for the nuisance. This certainly the law cannot require; but, again, it would be exceedingly dangerous for all persons navigating that river to open the draw for themselves whenever they should wish to pass the bridge. A train of cars might rush upon the bridge without notice just when the draw should be so open. For those navigating the river to be charged with this fearful responsibility and with notice as to just when the company may so run its trains across the bridge and with the duty to notify approaching trains from either way to stop until the draw is closed would be unlawful imposition. White *v.* Chapin, 102 Mass.,

138. But it is useless to further discuss such a proposition

119 against all reason and authority. Weisenberg *v.* Winneconne, *supra.* It was clearly a glaring omission of duty on the part of the company not to have had some one at the place to open the draw when so necessary. The general question of the right of a railway company or a municipal corporation to temporarily obstruct navigable rivers by bridges and of the serviency of navigation to railway travel and transportation has been too well settled since the Wheeling bridge cases to be now opened. Railways may so obstruct and delay navigation to an extent reasonably necessary by bridges and other constructions, but no further. Tested by this invariable rule the company, in the instance complained of, had no right to delay the tug-boats used by assignors longer than the bridge could have been opened by the company by due diligence.

4th. If it was necessary that the assignors should procure tug-boats with an adjustable smoke-pipe that could pass under the draw closed in order to avoid unnecessary delay and damage the evidence seems to be that they did so as soon as they could. But does the law in such a case impose the duty upon those navigating that river to resort to extraordinary and unusual methods of tug-boat construction in order to avoid delay and damage? We think not. The assignors had the right to use common and ordinary tugs in their business. They were not required to go a long distance and be at expense to find tugs which could be used on that river without opening the bridge. The company may as well claim that

120 they need not have draws in their bridges over navigable waters because boats and vessels might be so constructed as

to pass under them. The company must adopt such construction to the necessities of such boats and vessels as usually and commonly navigate such waters.

5th. There is no contest over the first class of damages mentioned in the complaint, but as to the second class of damage the learned counsel of the appellant contends that such was too remote and speculative. The verdict of the jury divided these damages and found, first, for that resulting at the time from delays at the bridge; and, secondly, that arising from the consequent loss to the assignors in carrying on their business from such delays and hindrances. These last damages seem to have been computed as the additional cost to them of getting out their logs in a season of low water, made necessary by such delays in the season of high water. That such seasons of high and low water usually occur every year or in most years in respect to our rivers in this State and Minnesota is of common knowledge. It is also common to adjust and regulate the lumber business upon such rivers by the reasonable expectation that such seasons will occur, and their occurrence may well be considered to be in the ordinary course of nature, and may be presumed to be considered, contemplated, and anticipated by contracting parties in relation to such use of the rivers, and are so common and usual as not to form an unexpected, uncertain, speculative, and independent cause intervening to break the connection and continuity be-
121 tween the delays in the season of high water as the cause and the increased cost of the work in the season of low water as the consequence. The learned counsel of the appellant plausibly insists that the company shall not be held responsible for providential drouths or such drouth as occurred in the fall of the year of 1883, which was the cause of the increased cost and damage to the assignors. That might be so if such low water was an unusual and extraordinary occurrence in that year, not to be anticipated or expected. If we applied the rule in cases of contract to this case we might well say that at the time the company was causing these delays in the spring it might have anticipated and expected that the assignors would be compelled thereby to carry on their business in the fall or season of low water at a greatly increased cost. It follows that, according to the rule laid down in Brown *v.* Railway Co., 54 Wis., 342, these damages are the natural, proximate, and direct consequence of these delays. See also Cockburn *v.* Lumber Co., *id.*, 619.

6th. Intimately connected with this question is whether these damages are speculative and cannot be certainly ascertained. Are they ideal, theoretical, or imaginary? If so, they cannot be recovered. If this suit had been brought after the first damages had been suffered and before the last had occurred, and it had been sought to be proved what damages the assignors would probably suffer by increased cost of their work in the fall of that year occasioned by such delays by reason of low water, such damages might be called speculative with better reasons, for then
122 such damage might or might not have occurred. It might have been an exceptional year of high water the whole year, and other circumstances might not have been present; but these

natural occurrences all took place, and without the fault of the assignors they were compelled to suffer this increased cost of their work. What before might have been speculation had become fixed facts which formed the data of certain estimation and computation of the exact loss. Similar damages have been allowed and sanctioned by this court, whatever may be the conflict of authority elsewhere, but we do not find much conflict on the question. In Shepard *v.* Gas-Light Co., 15 Wis., 318, the pecuniary loss, inconvenience, and annoyance experienced by the plaintiff in his mercantile business by the defendant's refusal to furnish gas were allowed as consequential damages. In Jolly *v.* Single, 16 Wis., 280, the defendant took wrongful possession of a mill rightfully in the possession of the plaintiff and detached therefrom certain machinery when the plaintiff had logs to saw in said mill, which he was thereby prevented from doing. The defendant asked the instruction that the plaintiff could only recover the cost of restoring the mill to running order or the value of the property carried away. Mr. Justice Paine said in his opinion: "Such a rule applied to such a case would be grossely unjust. A party is in possession of a mill and has hired a large number of men to work it. He has on hand a large number of logs which he is entitled to saw and in sawing which he can
123 earn a certain sum each day over and above all expenses."

These were the elements of the damages found by the jury and approved by this court in Kinney *v.* Crocker, 18 Wis., 74. Evidence of the nature and extent of the plaintiff's business and the loss resulting to him from inability to attend to it by reason of the injury was decided to be proper, and the instruction that "if a man had an ordinary business yielding ordinary receipts he would be entitled to recover the diminution of those receipts resulting from his inability to attend*ed* to his business occasioned by the injury" was approved. See also Flick *v.* Wetherbee, 20 Wis., 392; Blair *v.* Railway, 20 Wis., 262; Richardson *v.* Chufnoweth, 26 Wis., 656; City of Ripon *v.* Bittle, 30 Wis., 614; Luck *v.* City of Ripon, 52 Wis., 196, and Bierbach *v.* Goodyear R. Co., 54 Wis., 208. Finally, we think the evidence shows that the assignors did all that the law required them to do to prevent the damages they suffered. The case was very ably presented on both sides. We find no error in the record.

The judgment of the circuit court is affirmed.

(Endorsements:) (No. 24.) August term, 1885. Irwin W. Gates, respondent, against Northern Pacific Railroad Company, appellant. Opinion by Orton, J. Filed Sept. 22, 1885. Clarence Kellogg, clerk sup. c't Wis.

124 IRWIN W. GATES, Respondent,

vs.

THE NORTHERN PACIFIC RAILROAD COMPANY, Appellant.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true